# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956 1957

No. 40

WILLIAM HOAG, PETITIONER,

vs.

THE STATE OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

**PETITION FOR CERTIORARI FILED JUNE 11, 1956**

**CERTIORARI GRANTED NOVEMBER 13, 1956**

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1956

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## No. 567

## WILLIAM HOAG, PETITIONER,

vs.

## THE STATE OF NEW JERSEY

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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### INDEX


| | Original | Print |
|---|---|---|
| Proceedings in the Supreme Court of New Jersey | 1 | 1 |
| Excerpts from the brief of the State | 1 | 1 |
| Indictment No. 17231 filed in Superior Court of New Jersey | 1 | 1 |
| Indictment No. 17232 filed in Superior Court of New Jersey | 2 | 2 |
| Indictment No. 17233 filed in Superior Court of New Jersey | 3 | 3 |
| Indictment No. 17966 filed in Superior Court of New Jersey | 4 | 4 |
| Record of acquittal on indictments Nos. 17231, 17232 and 17233 from Bergen County Court | 6 | 5 |
| Judgment Roll on indictment No. 17966 from Bergen County Court | 9 | 7 |
| Corrected sentence on Indictment No. 17966 | 23 | 8 |
| Statement of proceedings in lieu of record and approval thereof | 26 | 8 |
| Opinion of the Appellate Division of the Superior Court of New Jersey, Jayne, J. | 31 | 13 |

| | Original | Print |
|---|---|---|
| Transcript of testimony on Indictments Nos. 17231, 17232 17233 on May 26 and May 27, 1952 in Bergen County Court | 1 | 18 |
| Appearances | 1 | 18 |
| Testimony of Charles Galiardo— | | |
| Direct | 2 | 19 |
| Cross | 6 | 22 |
| Redirect | 22 | 33 |
| Recross | 28 | 37 |
| Testimony of Anthony Dottino— | | |
| Direct | 37 | 44 |
| Cross | 40 | 46 |
| Testimony of Patsy Cascio— | | |
| Direct | 48 | 51 |
| Cross | 52 | 54 |
| Testimony of Louis Capezzuto— | | |
| Direct | 52 | 54 |
| Cross | 54 | 55 |
| Testimony of Elmer Yager— | | |
| Direct | 56 | 57 |
| Cross | 59 | 59 |
| Dismissal of "concealed weapons" count in the three indictments | 97 | 87 |
| Testimony of William James Hoag— | | |
| Direct | 97 | 87 |
| Cross | 108 | 94 |
| Testimony of Elmer Yager (recalled)— | | |
| Direct | 118 | 101 |
| Cross | 118 | 102 |
| Testimony of William Hoag (recalled)— | | |
| Direct | 128 | 109 |
| Cross | 128 | 109 |
| Reporter's certificate (omitted in printing) | 130 | |
| Transcript of testimony on Indictment No. 17966 on October 18, 1954 in Bergen County Court | 1 | 110 |
| Appearances | 1 | 110 |
| Testimony of Elmer S. Yager— | | |
| Direct | 1 | 111 |
| Cross | 13 | 118 |
| Redirect | 33 | 134 |
| Recross | 34 | 135 |
| State rests | 35 | 135 |
| Reporter's certificate (omitted in printing) | 36 | |
| Testimony of Anthony Dottino— | | |
| Direct | 40 | 136 |
| Cross | 42 | 137 |
| Redirect | 47 | 141 |
| Recross | 48 | 141 |

| | | Original | Print |
|---|---|---|---|
| Transcript of testimony on Indictment No. 17966 on October 18, 1954 in Bergen County Court—Continued | | | |
| Testimony of Charles Galiardo— | | | |
| Direct | | 50 | 143 |
| Cross | | 51 | 143 |
| Redirect | | 55 | 146 |
| Recross | | 56 | 147 |
| Testimony of Patsy Cascio— | | | |
| Direct | | 58 | 149 |
| Cross | | 59 | 149 |
| Redirect | | 60 | 150 |
| Testimony of Louis Capezzuto— | | | |
| Direct | | 60 | 150 |
| Cross | | 61 | 151 |
| Testimony of John Terranova— | | | |
| Direct | | 63 | 152 |
| Cross | | 68 | 155 |
| Redirect | | 68 | 155 |
| Testimony of William B. Ackerman— | | | |
| Direct | | 71 | 156 |
| Testimony of William Hoag— | | | |
| Direct | | 73 | 158 |
| Cross | | 82 | 163 |
| Redirect | | 105 | 179 |
| Recross | | 108 | 181 |
| Testimony of Carl De Marco— | | | |
| Direct | | 131 | 195 |
| Cross | | 135 | 198 |
| Reporter's certificate | (omitted in printing) | 139 | |
| Opinion, Wachenfeld, J. | | 140 | 201 |
| Dissenting opinion, Heher, J. | | 149 | 208 |
| Mandate on affirmance | | 162 | 218 |
| Clerk's certificate | (omitted in printing) | 163 | |
| Order allowing certiorari | | 164 | 219 |

[fol. 1] **APPENDIX TO BRIEF OF STATE**

IN SUPERIOR COURT OF NEW JERSEY, SEPTEMBER TERM A. D. 1950, THIRD STATED SESSION

INDICTMENT NO. 17231

BERGEN COUNTY, TO WIT:

The Grand Inquest of the State of New Jersey, in and for the County of Bergen, upon their respective oaths, present, that William Hoag, John Doe, and Richard Roe, late of the Borough of Fairview in the said County of Bergen, on the twentieth day of September in the year of our Lord one thousand nine hundred and fifty, at the Borough aforesaid, in the County aforesaid, and within the jurisdiction of this Court, being then and there armed with deadly weapons, to wit: two automatic pistols, did wilfully, feloniously and forcibly take from the person of one Patsy Cascio, certain personal goods and chattels, to wit: currency and one gold ring, all of the value of three hundred dollars, in lawful money of the United States of America, the goods and chattels of the said Patsy Cascio, by putting him, the said Patsy Cascio, in fear, in violation of R. S. 2:166-1, against the peace of this State, the Government and dignity of the same.

And the Grand Inquest Aforesaid upon Their Respective Oaths Aforesaid Do Further Present that: William Hoag, John Doe and Richard Roe, late of the Borough of Fairview in the said County of Bergen, on the twentieth day of September, in the year of our Lord one thousand nine hundred and fifty, at the Borough aforesaid, in the County aforesaid and within the jurisdiction of this Court, did [fol. 2] wilfully and unlawfully carry concealed in or about their clothes or persons two automatic pistols, in violation of R. S. 2:176-41, against the peace of this State, the Government and dignity of the same.

Deputy Attorney General.

IN SUPERIOR COURT OF NEW JERSEY, SEPTEMBER TERM A. D. 1950, THIRD STATED SESSION

INDICTMENT No. 17232

BERGEN COUNTY, TO WIT:

The Grand Inquest of the State of New Jersey, in and for the County of Bergen, upon their respective oaths, present, that William Hoag, John Doe, and Richard Roe, late of the Borough of Fairview in the said County of Bergen, on the twentieth day of September in the year of our Lord one thousand nine hundred and fifty, at the Borough aforesaid, in the County aforesaid, and within the jurisdiction of this Court, being then and there armed with deadly weapons, to wit: two automatic pistols, did wilfully, feloniously and forcibly take from the person of one Louis Capezzuto, certain personal goods and chattels, to wit: currency of the value of Two Hundred Ninety Three Dollars, in lawful money of the United States of America, the goods and chattels of the said Louis Capezzuto, by putting him, the said Louis Capezzuto, in fear, in violation of R. S. 2:166-1, against the peace of this State, the Government and dignity of the same.

[fol. 3] And the Grand Inquest Aforesaid upon Their Respective Oaths Aforesaid Do Further Present That: William Hoag, John Doe and Richard Roe, late of the Borough of Fairview in the said County of Bergen, on the twentieth day of September, in the year of our Lord one thousand nine hundred and fifty, at the Borough aforesaid, in the County aforesaid and within the jurisdiction of this Court, did wilfully and unlawfully carry concealed in or about their clothes or persons two automatic pistols, in violation of R. S. 2:176-41, against the peace of this State, the Government and dignity of the same.

Deputy Attorney General.

IN SUPERIOR COURT OF NEW JERSEY, SEPTEMBER TERM A. D. 1950, THIRD STATED SESSION

INDICTMENT NO. 17233

BERGEN COUNTY, TO WIT:

The Grand Inquest of the State of New Jersey, in and for the County of Bergen, upon their respective oaths, present, that William Hoag, John Doe, and Richard Roe, late of the Borough of Fairview in the said County of Bergen, on the twentieth day of September in the year of our Lord one thousand nine hundred and fifty, at the Borough aforesaid, in the County aforesaid, and within the jurisdiction of this Court, being then and there armed with deadly weapons, to wit: two automatic pistols, did wilfully, feloniously and forcibly take from the person of one Charles Galiardo, certain personal goods and chattels to wit: one [fol. 4] wrist watch and currency of the value of One Hundred Forty Dollars, in lawful money of the United States of America, the goods and chattels of the said Charles Galiardo, by putting the said Charles Galiardo, in fear, in violation of R. S. 2:166-1, against the peace of this State, the Government and dignity of the same.

And the Grand Inquest Aforesaid upon Their Respective Oaths Aforesaid Do Further Present That: William Hoag, John Doe and Richard Roe, late of the Borough of Fairview in the said County of Bergen, on the twentieth day of September, in the year of our Lord one thousand nine hundred and fifty, at the Borough aforesaid, in the County aforesaid and within the jurisdiction of this Court, did wilfully and unlawfully carry concealed in or about their clothes or persons two automatic pistols, in violation of R. S. 2:176-41, against the peace of this State, the Government and dignity of the same.

Deputy Attorney General.

IN SUPERIOR COURT OF NEW JERSEY, SEPTEMBER TERM A. D. 1951, THIRD STATED SESSION

INDICTMENT No. 17966

BERGEN COUNTY, TO WIT:

The Grand Inquest of the State of New Jersey, in and for the County of Bergen, upon their respective oaths, present, that John Doe, James Roe, and William Hoag, late of the Borough of Fairview in the said County of Bergen, on the twentieth day of September in the year of our Lord one thousand nine hundred and fifty, at the Borough [fol. 5] aforesaid, in the County aforesaid, and within the jurisdiction of this Court, being then and there armed with deadly weapons, to wit: two automatic pistols, did wilfully, feloniously and forcibly take from the person of one Elmer S. Yager, certain personal goods and chattels, to wit: one wallet and one wrist watch of the value of fifty dollars, in lawful money of the United States of America, the goods and chattels of the said Elmer S. Yager, by putting him, the said Elmer S. Yager, in fear, in violation of R. S. 2:166-1, against the peace of this State, the Government and dignity of the same.

And the Grand Inquest Aforesaid upon Their Respective Oaths Aforesaid Do Further Present that John Doe, James Roe, and William Hoag, late of the Borough of Fairview in the said County of Bergen, on the twentieth day of September, in the year of our Lord one thousand nine hundred and fifty, at the Borough aforesaid, in the County aforesaid and within the jurisdiction of this Court, did wilfully and unlawfully carry concealed in or about their clothes or persons two automatic pistols, in violation of R. S. 2:176-41, against the peace of this State, the Government and dignity of the same.

Harry L. Towe, Deputy Attorney General.

[fol. 6] IN THE BERGEN COUNTY COURT

HON. A. D. DEL MAR, Presiding

RECORD OF ACQUITTAL ON INDICTMENTS Nos. 17231-17232-17233

May 26, 1952.

Indictments Nos. 17231, 17232 and 17233

THE STATE OF NEW JERSEY

vs.

WILLIAM HOAG, Defendant

Charges—Robbery and C.C.W. in Each Indictment

| | |
|---|---|
| Max Eisenstein | Martin Cummins |
| Deputy Attorney General | Attorney for Defendant |

Motion for severance as to William Hoag granted.

—3— Challenges —6—

Jury

1. Donald E. Tyrrell
2. Edward E. Smith
3. Jeanette G. Stickney
4. H. Harry Nagel
5. Mabel Lee Bowen
6. James C. Austin, Jr.
7. Francis F. Camicioli
8. Hugh J. Traynor, Jr.
9. Chester Krantz
10. Eleanor Ackerman
11. Michael Bartman
12. Alfred Terminella

Jury sworn by the clerk. Both counsel opened to the court and jury.

Witnesses

State

1. Charles Galiardo
2. Anthony Doftino

[fols. 7-8] 3. Patsy Cascio

4. Louis Capezzuto
5. Elmer Yager

Second count of each indictment charging C. C. W. dismissed by the court.

Motion to dismiss first count charging Armed Robbery denied.

| | Defends. |
|---|---|
| | 1. William Hoag |
| Rebuttal | Sur Rebuttal |
| Elmer Yager—recalled | William James Hoag—recalled |

4:10 P. M. Recess to May 27, 1952.

May 27, 1952.

10 A. M. Court reconvened. Jury called by the clerk. All answered present.

Case closed and evidence submitted to the jury upon summation of counsel and charge of the court.

The jury retired to consider of their verdict having an officer sworn to attend them.

The jury returned into court and upon being called they all answered present and said that they find the defendant William Hoag Not Guilty.

[fol. 9] IN COUNTY COURT OF BERGEN COUNTY

(Law Division)

(Criminal)

JUDGMENT ROLL ON INDICTMENT No. 17966

November 5th, 1954.

THE STATE OF NEW JERSEY

vs.

WILLIAM HOAG, Defendant

JUDGMENT

No. 17966

Stated Session Third

Indictment for Robbery & C. C. W.
Term September A. D. 1951
Filed: August 14, 1952.
Arraigned: June 4th, 1954.
Plea: "Not Guilty"
Retracted:
Trial: October 18th & 19th, 1954.
Verdict: "Guilty" Both Counts.

Sentence: November 5th, 1954:—(On 1st Count) (Robbery). The Court sentenced the defendant to a period of not less than Five (5) nor more than Seven (7) years in the New Jersey State Prison.

On the Second Count—(C. C. W.). The Court sentenced the defendant to a period of not less than One and one half (1½) nor more than three (3) years in the New Jersey State Prison.

[fols. 10-22] The above sentences to run consecutively with each other, and the defendant to be given credit for the 163 days already served in the Bergen County Jail.

Herman Vanderwart, Judge. Frank Wohlferth, Clerk.

[fols. 23-25] IN COUNTY COURT OF BERGEN COUNTY

CORRECTED SENTENCE.—December 17, 1954

On December 17th, 1954: The Court corrected the sentence imposed on November 5th, 1954 to read as follows:

The Court sentenced the defendant to a period of not less than five (5) nor more than seven (7) years in the New Jersey State Prison on the first count in the indictment (Armed Robbery).

The Court set aside the consecutive sentence imposed on the second count (C. C. W. not less than 1½ nor more than three (3) years State Prison).

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[fol. 26] IN THE COUNTY COURT OF BERGEN COUNTY

STATEMENT OF PROCEEDINGS IN LIEU OF RECORD AND APPROVAL THEREOF

It is hereby stipulated and agreed by and between Guy W. Calissi, Prosecutor of Bergen County, Attorney for the plaintiff-respondent, and Jacob Schneider, Attorney for the defendant-appellant, that in accordance with R. R. 1:6-2, the following statement and the portions of the record herein referred to, be submitted in lieu of record on defendant's appeal in the above entitled action.

## Statement of Facts

1. The defendant-appellant appeals from the following judgment:

County Court of Bergen County

Law Division, Criminal

November 5th, 1954

The State of New Jersey

vs.

William Hoag, Defendant

Judgment

No. 17966

Stated Session Third

Indictment for Robbery & C.C.W.
Term September A.D. 1951
Filed: August 4th, 1952
Arraigned: June 4th, 1954
Plea: "Not Guilty"
Trial: October 18th and 19th, 1954
Verdict: "Guilty" Both Counts.

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[fol. 27] Sentence: November 5th, 1954: (On 1st Count) (Robbery). The Court sentenced the defendant to a period of not less than Five (5) nor more than seven (7) years in the New Jersey State Prison.

On the Second Count—(C.C.W.) The Court sentenced the defendant to a period of not less than one and one-half (1½) nor more than three (3) years in the New Jersey State Prison.

The above sentences to run consecutively with each other, and the defendant to be given credit for the 163 days already served in the Bergen County Jail.

Herman Vanderwart, Judge. Frank Wohlferth, Clerk.

2. On December 17, 1954 said judgment was modified in that the conviction on the Second Count for Carrying Concealed Weapons and the sentence given thereunder were set aside by the Bergen County Court, Judge Vanderwart sitting. Said conviction and sentence were set aside on the grounds that same involved double jeopardy, in that the indictment for Carrying Concealed Weapons had been dismissed at a prior time, to-wit, May 27, 1952, on motion of the State, after the closing of the State's case.

3. The defendant was indicted on June 26, 1951 on three indictments, each having two counts as follows:

| Indictment No. | Date of Offense | Victim Named | Crime |
|---|---|---|---|
| 17231 | Sept. 20/50 | Patsy Cascio | 1st Count—Armed Robbery & 2nd Count—Carrying Concealed Weapons. |
| 17232 | Sept. 20/50 | Louis Capezzuto | 1st Count—Armed Robbery & 2nd Count—Carrying Concealed Weapons. |
| 17233 | Sept. 20/50 | Charles Galiardo | 1st Count—Armed Robbery & 2nd Count—Carrying Concealed Weapons. |

[fol. 28] 4. The defendant was tried under said indictments on May 26 and 27, 1952, and was acquitted on the First Count of all three indictments, the Second Count of each indictment having been dismissed by the Court on motion of the State, during the trial.

5. On July 17, 1952 defendant was indicted as follows:

| Indictment No. | Date of Offense | Victim Named | Crime |
|---|---|---|---|
| 17966 | Sept. 20/50 | Elmer S. Yager | 1st Count—Armed Robbery & 2nd Count—Carrying Concealed Weapons. |

6. The indictment of July 17, 1952 involved the Armed Robbery of Elmer S. Yeager which occurred on the same occasion, as set forth in the indictments of June 26, 1951 and the said Elmer S. Yager, the victim named in the new indictment, testified as to detail of the holdup at the trial on May 26 and 27, 1952, when defendant was acquitted of the charges that he robbed Patsy Cascio, Louis Capezutto and Charles Galiardo.

7. The defendant was tried on the indictment of July 17, 1952 on October 18 and 19, 1954 by the Bergen County Court and was found guilty on both counts.

8. Prior to the trial, during the trial, and at the present time the defendant has invoked the defense of former or double jeopardy on the grounds that there was but one incident and one holdup; that all of the victims were present at the same time and place, and that the testimony of all of the victims, including Elmer S. Yager, was given at the first trial, when defendant was acquitted.

9. The defendant had been granted leave by the Superior Court, Appellate Division, by an Order dated December 24, 1954 to appeal as an indigent person. He admittedly has no funds from which to order a stenographic transcript of the proceedings.

[fol. 29] Questions Presented

The only questions presented in the Appeal are:

1. Was the defendant denied the rights granted to him under the United States Constitution and the Constitution of the State of New Jersey in that the trial and conviction herein place defendant in double jeopardy by reason of his prior acquittal at the trial of May 26 and 27, 1952?

2. Were the rights of the defendant prejudiced when the Trial Court submitted to the Jury the Second Count of the Indictment in reference to Carrying Concealed Weapons, on which count defendant was convicted and which conviction was set aside by the Trial Court on December 17, 1954?

3. Were the rights of the defendant prejudiced by the actions of the State in presenting three indictments on June 26, 1951 and then after the acquittal of May 27, 1952 presenting a fourth indictment of July 17, 1952 and a trial of the latter on October 18 and 19, 1954?

Portions of Record to Be Included

1. There shall be included as part of the record the following:

a. Indictment Nos. 17231, 17232, 17233, 17966; the Record of Acquittal, the Motion to Dismiss, the Judgment Roll dated November 5, 1954, and the Petition for Leave to Appeal; all of which have been heretofore filed with the

Appellate Division in the Appendix of the plaintiff-respondent.

b. The modification of the Conviction and Sentence dated December 17, 1954.

c. The Notice of Appeal and acknowledgement of service thereof.

[fol. 30] d. The Order assigning Counsel, dated December 1, 1954.

e. The Order granting leave to prosecute the Appeal in Forma Pauperis.

Points Relied on by the Defendant-Appellant

1. The trial and conviction on the Indictment No. 17966 was barred by the prior acquittal under Indictment Nos. 17231, 17232, 17233.

2. The trial and conviction of the defendant violated the United States and the New Jersey Constitutions in that the defendant was placed in double jeopardy.

3. The submission to the Jury by the Trial Court of Count No. 2 of the Indictment was prejudicial to the rights of the defendant.

4. The actions of the State in partially indicting the defendant, trying him on said indictments, then further indicting him after an acquittal, and then again trying him, all for a matter arising out of one incident at one time, was unduly prejudicial to the rights of the defendant.

Guy W. Calissi, Prosecutor of Bergen County, Attorney for Plaintiff-Respondent, By: (S.) Morris Malech. (S.) Jacob Schneider, Attorney for Defendant-Appellant.

The foregoing agreed statement in lieu of record is hereby approved.

(S.) Herman Vanderwart, Judge, County Court of Bergen County.

February, 1955.

[fol. 31] IN THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

OPINION—June 2, 1955

Argued May 2, 1955. Decided June 2, 1955.

Before: Judges Clapp, Jayne, and Francis.

Mr. Jacob Schneider argued the cause for appellant.

Mr. William J. Arnold argued the cause for respondent. (Mr. Guy W. Calissi, Bergen County Prosecutor; Mr. William C. Brudnick, Special Assistant Prosecutor, on the brief).

The opinion of the court was delivered by JAYNE, *J. A. D.*

The defendant has been permitted to prosecute the present appeal as an indigent person. R. R. 1:2-7; 2:2-5. By reason of that circumstance the factual structure upon which the defendant's points of appeal are to be considered is in the form of a statement of facts to which counsel for the defendant and for the State have subscribed and upon which the trial judge has endorsed his approval. R. R. 1:6-2; 2:6.

On September 20, 1950, four persons, Patsy Cascio, Louis Capezzuto, Charles Galiardo, and Elmer S. Yager were patrons in a tavern in Fairview, Bergen County, where with the display of a drawn gun the defendant and two confederates were said to have robbed them and fled. On June 26, 1951, three separate indictments were returned charging in the first count the defendant and two persons whose names were unknown with the commission of the armed robbery of Patsy Cascio (No. 17231), Louis Capezzuto (No. 17232), and Charles Galiardo (No. 17233).

It is of present significance to observe that each indictment charged the commission of the robbery upon the one victim therein designated and that there was no indictment charging the defendants with robbing Elmer S. Yager. Also of present pertinency is the circumstance that the second count of each indictment accused the defendants of the offense of carrying concealed weapons.

[fol. 32] On May 26, 27, 1952, the defendant Hoag was tried on the three indictments above mentioned. Pursuant

to the direction of the court he was acquitted of the offense of carrying concealed weapons, and the jury found him not guilty of the crime of the armed robbery of Cascio, Capezzuto, and Galiardo.

On July 17, 1952, the present appellant was indicted (No. 17966) for the armed robbery on September 20, 1950 (the same occasion) of Elmer S. Yager, whom he had not been accused in the previous indictments of robbing, and again for the unlawful carrying of concealed weapons on that occasion. The trial of the defendant on this indictment on October 18, 19, 1954, resulted in a verdict of guilty on both counts.

On November 5, 1954, the defendant was sentenced to imprisonment for the commission of the armed robbery of Yager alleged in the first count of the indictment and given a consecutive sentence of imprisonment on the second count which charged him with carrying a concealed weapon. On December 17, 1954, by reason of the former acquittal, the latter sentence was nullified by the court. The present appeal is therefore addressed to the propriety of the conviction of the defendant for robbing Yager.

The following paragraphs of the approved statement of facts are approximately quoted:

> "6. The indictment of July 17, 1952 involved the Armed Robbery of Elmer S. Yager which occurred on the same occasion, as set forth in the indictments of June 26, 1951 and the said Elmer S. Yager, the victim named in the new indictment, testified as to details of the holdup at the trial on May 26 and 27, 1952, when defendant was acquitted of the charges that he robbed Patsy Cascio, Louis Capezzuto and Charles Galiardo.
>
> . . . . . .
>
> [fol. 33] 8. Prior to the trial; during the trial, and at the present time the defendant has invoked the defense of former or double jeopardy on the grounds that there was but one incident and one holdup; that all of the victims were present at the same time and place, and that the testimony of all of the victims, including Elmer S. Yager, was given at the first trial, when defendant was acquitted."

The point predominantly emphasized on behalf of the defendant is that he was subjected by the indictment of July 17, 1952 and by the trial in pursuance thereof to double jeopardy.

A dissertation anent the subject of former jeopardy would constitute little more than the unnecessary inflation of this intended memorandum expressive of our conclusions.

It may, however, be serviceable to marshal the citations of the recent decisions in our jurisdiction concerning the subject: *State* v. *DiGiosia*, 3 N.J. 413 (1950); *State* v. *Labato*, 7 N.J. 137 (1951); *State* v. *Pennsylvania Railroad Co.*, 9 N.J. 194 (1952); *State* v. *Shoopman*, 11 N. J. 333 (1953); *State* v. *Lefante*, 12 N. J. 505 (1953); *State* v. *Midgeley*, 15 N. J. 574 (1954); *State* v. *Locklear*, 16 N. J. 232 (1954); *State* v. *McGrath*, 17 N. J. 41 (1954); *State* v. *McBride*, 15 N. J. Super. 436 (App. Div. 1951); cert. den., 342 U. S. 895, 96 L. Ed. 670, 72 S. Ct. 204 (1951); *State* v. *Cruz*, 15 N. J. Super. 577 (L. Div. 1951); *State* v. *Coolack*, 17 N. J. Super. 192 (Co. Ct. 1951); *State* v. *Louden*, 21 N.J. Super. 497 (App. Div. 1952); *State* v. *Tumbiolo*, 28 N. J. Super. 231 (App. Div. 1953), cert. den., 347 U. S. 948, 98 L. Ed. 1095, 74 S. Ct. 647 (1954); *State* v. *Greely*, 30 N. J. Super. 180 (Co. Ct. 1954); affirmed, 31 N. J. Super. 542 (App. Div. 1954); *Sylcox* v. *Dearden*, 30 N. J. Super. 325 (App. Div. 1954); *State* v. *Brandon*, 32 N. J. Super, 269 (Co. Ct. 1954); *State* v. *Oats*, 32 N. J. Super. 435 (App. Div. 1954).

[fol. 34] Simply stated, the question addressed to us is whether in the one criminal undertaking now commonly characterized as a "hold-up" a defendant who was acquitted of robbing A, B, and C can be thereafter indicted and prosecuted for robbing D.

Initially we consult the statute to ascertain the essential elements of robbery as therein expressed. We quote the pertinent portion:

> "Any person who forcibly *takes from the person of another*, money or personal goods and chattels, of any value whatever, by violence or putting him in fear, is guilty * * *, N. J. S. 2A:141-1.

Noticeably to constitute robbery there must be the commission of a larceny from the person of another accomplished with the element of force or fear. *State* v. *McDonald*, 89 N. J. L. 421 (Sup. Ct. 1916); affirmed, 91 N. J. L. 233 (E. & A. 1918).

In determining former jeopardy we are not so critically concerned with whether or not the act was an associated component of the expansive criminal project of transaction as we are with whether the act was inherently and in substance and character the identical offense for the commission of which the defendant had been previously tried. The constitutional inhibition protects the person from another prosecution, after acquittal, for the same offense. Const. (1947), Art. I, par. 11. *Vide*, *State* v. *Cooper*, 13 N. J. L. 361 (Sup. Ct. 1833).

Not infrequently there exists an act-offense dichotomy. Then, too, there are inclusory offenses which incorporate or encompass lesser offenses. Ofter do we observe indictments which in separate counts partition a single criminal deed into the allegation of several segmented violations of the law, each count resting upon a legalistic variation of the same fact pattern.

[fol. 35] The "identical act" concept is many a time illusive and fertile with intrinsic difficulties. Courts have injected into its interpretation such distinct elements as the unity of the actor's movement, or the scope of his intent, or the outcome of his deed.

Certainly to sustain the plea of *autrefois acquit* there must be an acquittal of the offense charged in law and in fact. *State* v. *DiGiosia*, *supra*. In our jurisdiction the recognized test of former jeopardy is whether the evidence necessary to sustain the second indictment would have been sufficient to secure a legal conviction on the first, unless there has been a prior acquittal or conviction of a greater offense which was inclusive of the lessor offense sought to be subsequently prosecuted. *State* v. *DiGiosia*, *supra*; *Sylcox* v. *Dearden*, *supra*.

Neither the identical act nor the same evidence norms avail the defendant in the present case. Conceivably the one act of brandishing a pistol in a menacing manner might have simultaneously placed Cascio, Capezzuto, Galiardo, and Yager in a state of fear and intimidation, but to con-

stitute robbery, the act must necessarily be complemented by the additional and successive act of taking "from the person of another, money or personal goods and chattels, * * * ."

At his former trial the defendant was not charged with placing Yager in fear and taking any money or personal property from him. Surely evidence that the defendant robbed Yager would not be necessary to establish his guilt of robbing Cascio, Capezzuto, and Galiardo. The robbing of Yager was not an essential ingredient or legally integral part of the alleged offenses of robbing the other three.

It should be recalled that in *State* v. *Pennsylvania Railroad Co., supra,* it was stipulated that "the same facts would be put in evidence to prove each offense." The [fol. 36] statement of facts submitted in the present appeal does not contain an acknowledgement of an analogous import, and we canot perceive how it could properly do so.

In the recent decision in *People* v. *Lagomarsino,* 217 P. 2d 124 (Dist. Ct. of App. Calif., 1950), it was stated (at p. 129):

> "Whatever conflict may exist in the cases involving offenses against property, when we come to offenses against persons, there is more unanimity. Particularly is thus true of robbery cases, the offenses here involved. The majority, and certainly the better rule, is that there is a separate offense committed against each person robbed. Obviously, a robbery of several persons, where property is removed from each person, involves a separate act and a separate intent toward each victim."

This appears to be the rationalism in our jurisdiction. *Vide, State* v. *McBride, supra; State* v. *Coolack, supra.* We shall not undertake to laden this memorandum with the citations of the many pertinent decisions of the courts of other states which we have examined.

We conclude that the defendant was not subjected to double jeopardy. We may add that we do not discover in the condensed record before us any occasion for the application of the principles of *res judicata* or collateral estoppel which are sometimes modernly invoked in the circum-

stances of a subsequent prosecution of a previously determined issue in a criminal case. For example, where the presence or the identity of the defendant is disclosed to have been the cardinal issue which was manifestly resolved by the jury in the previous trial in favor of the defendant.

Assuredly our proecutors are aware that the concept of double jeopardy is designed to prevent the government from unduly harassing an accused, and we are confident [fol. 37] that they will not resort unfairly to multiple indictments and successive trials in order to accomplish indirectly that which the constitutional interdiction precludes.

The remaining points incidentally advocated on behalf of the defendant are not impressive.

The judgment of conviction is affirmed.

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[fol. 1] BERGEN COUNTY COURT, LAW DIVISION

THE STATE OF NEW JERSEY

vs.

WILLIAM HOAG, Defendant

Court House, Hackensack, N. J., May 26 and 27, 1952

BEFORE: Honorable A. Demorest Del Mar, J. C. C., and a Jury.

**Transcript of Testimony of May 26 and May 27, 1952**

APPEARANCES:

For the State, Max Eisenstein, Deputy Attorney General.
For the Defendant, Martin Cummins.

[fol. 2] (A jury was duly empanelled and sworn).

(Counsel for the State makes an opening statement to the jury).

(Counsel for the Defendant makes an opening statement to the jury).

CHARLES GALIARDO sworn.

Direct Examination.

By Mr. EISENSTEIN:

Q. Sir, are you also known under the name of Charles Gay?

A. No. That's just a trade name we use in the tavern, Gay.

Q. You are the proprietor of the tavern. Is that correct, sir?

A. That's right.

Q. The name of that tavern is what?

A. Gay's Tavern.

Q. Where is that located?

A. 307 Bergen Boulevard, Fairview.

Q. Were you the owner of that tavern on September 20, 1950?

A. I was.

Q. Were you in the place of business on that day?

A. I was, yes.

Q. Did a hold-up occur on that day?

A. Yes.

Q. In your tavern?

A. Yes.

Q. What time of the day or night did this hold-up occur?

A. 3:30 in the afternoon, approximately 3:30 in the after- [fol. 3] noon.

Q. Where were you at the time when this hold-up first occurred?

A. In the kitchen.

Q. Is that adjacent to the bar?

A. It is right next to the bar. There is a partition in between.

Q. Were you cooking or doing something?

A. Making a sandwich.

Q. You were making a sandwich in the kitchen.

A. Yes.

Q. When was the first time that you learned that a hold-up was taking place in your place of business?

A. I heard quite a commotion in the place and I thought

somebody hit a home run on the radio—the ball game was on. I come outside and I was confronted by a man who said, "This is a stick-up." I come out of the kitchen and went into the bar and I was stopped by a man who said, "This is stick-up."

Q. You were stopped by a man who said, "This is a stick-up."

Did this man have any instrument in his hand?

A. He had an automatic in his hand.

Q. Was he alone or were there others with him?

A. There was other people in the tavern. At a quick glance I saw the men with guns in their hands.

Q. At a quick what?

[fol. 4] A. At a quick glance I saw other fellows with guns in their hands.

Q. What did they say or do to you?

A. They told me to put up my hands and to back against the wall.

Q. Did you go up against the wall?

A. I did.

Q. Were there any persons present in this tavern at that time?

A. I should say there was about 12 people.

Q. 12 people?

A. 12 patrons.

Q. They were all lined up against this wall?

A. At that particular time there was only four lined up against this wall.

Q. What happened to the others?

A. They were just standing by the bar.

Q. They weren't told to go up against the wall?

A. I don't know, but they still sitting by the bar.

Q. You were one of those that was lined up against the wall?

A. Yes, sir.

Q. And three others. Is that correct, sir?

A. Right.

Q. What happened after you were lined up against the wall?

A. They asked for my money. I told them to take the wallet out of my pocket. They took my money. Then I was directed inside to lie on the floor.

Q. What is that, the kitchen?

A. That is a separate dining room.

Q. Did anybody else go with you in this separate dining room that you describe?

[fol. 5] A. I think everybody else followed me in the dining room.

Q. What happened in there?

A. We were told to lie down and we were tied with our hands behind my back and they took my watch.

Q. Were you lying on your back?

A. On my stomach.

Q. I think you said your hands were tied behind your back?

A. Behind my back.

Q. They took a wrist watch from you. Is that what you said, sir?

A. That's right.

Q. They also took some money?

A. Right.

Q. What was the value of that approximately, of that watch and money they took from you?

A. Well, between the watch and my personal money and the tavern money it should run over $700.00.

Q. They also took, besides your wallet, they took money from the register?

A. Register money, out of the cash register.

By the Court:

Q. On this estimate how much value do you place on the watch?

A. $450.00.

Q. $450.00?

A. That's right.

Q. That makes it about $250.00 in cash?

A. That's right, approximately.

By Mr. Eisenstein:

Q. Were you in fear as a result of this operation that [fol. 6] occurred?

A. I was.

Q. Could you describe to any extent the name of this pistol or revolver that you say was in their hands?

A. I think it was a foreign make. I don't know. It might have been a German Luger, I'm not so sure.

Q. Now, are you able to identify the person or persons who were connected with this hold-up?

A. Can I answer that any way I want, sir?

Q. Just answer the question.

A. I'm not positive, but I think so.

Q. Will you do so.

A. This Mr. Hoag looks like the man that was in my place.

Q. "This Mr. Hoag." You are referring to the defendant in this case. Is that correct?

A. Right.

Q. You are not positive?

A. Right.

Cross-Examination.

By Mr. CUMMINS:

Q. Mr. Galiardo, how many men were in the hold-up, holding the place up?

A. You mean the men that came in to rob the place?

Q. Outside of patrons.

A. Outside of patrons I would say there was at least five.

Q. You say that he looks like one but you are not sure?

A. Right.

Q. Were you taken to two line-ups in New York?

[fol. 7] A. I think so. I was taken to more than two line-ups.

Q. Was Hoag in one of them?

A. I don't think so.

Q. Well, are you sure?

A. No, I'm not sure.

Q. As a matter of fact, do you remember one line-up where you specifically looked at him and said, "I don't think that is the man" or words to that effect?

A. I looked at 12 men in the line-up and I said, "I don't think the man is there."

Q. Do you know whether the man was there, the man Hoag was there?

A. No, I don't.

Q. But if Hoag were in any of those line-ups that you were at you did not identify him.

A. That's right.

Q. You say he wasn't there.

A. I don't think he was there.

Q. You couldn't identify him at that time.

A. Right.

Q. How long ago did this happen?

A. Well, I couldn't say; I haven't the slightest idea.

Q. Are you prepared to swear that he is the man that was there?

A. I am not.

Q. Under oath?

A. I am not.

Mr. Cummins: I move to dismiss his testimony it looks like him, if your Honor please.

The Court: Motion denied.

Q. Will you tell us how the man that you say looked like Hoag was dressed on that day?

[fol. 8] A. Well, I think he had a short coat.

Q. What color?

A. Brown, I believe.

Q. Did he wear glasses?

A. Do I wear glasses?

Q. Did he wear glasses?

A. I don't think so.

Q. Well, Mr. Galiardo, did he wear glasses on that day? Tell us, if you know, and if you don't know, say you don't know.

A. In the excitement I don't think I would have known if he had glasses or not.

Q. You don't know whether he wore glasses or not?

A. That's right.

Q. You were quite excited?

A. Absolutely.

Q. Why do you think that the man who was there looked like Hoag?

A. Well, he resembles the man very much.

Q. In what way?

A. The height and his appearance.

Q. How tall was the man that was there?
A. I should say 6 foot.
Q. How much did he weigh?
A. I haven't the slightest idea.
Q. As heavy as I am?
A. I don't think so, much thinner than you.
Q. 200 pounds?
A. No.
Q. 160?

Mr. Eisenstein: Your Honor, this is not a weight-guessing contest. The witness said he hasn't the slightest [fol. 9] idea and he is not proficient as a weight guesser.

Mr. Cummins: He is not proficient in answering questions and that is the reason I am asking him. The witness said it looked like him but he is not sure.

The Court: There is no reason for any discussion between counsel. I think the cross-examination is proper.

Q. Have you any idea how much he weighed?
A. No.
Q. Would he have weighed 200?
A. No, much less.
Q. Would he have weighed 100?
A. No, more.
Q. Would he have weighed 175?
A. I would say between 160 and 165.
Q. You say he had a brown short coat?
A. I think it was a brown short coat.
Q. Were you excited?
A. Yes, sir.
Q. You remember everything in detail?
A. As much as I could under the excitement.
Q. Who was it that took the watch from you?
A. I had my face into the floor. I don't know.
Q. What did the bandit or robber look like that was close to you at the time you went to the floor?
A. I haven't the slightest idea.
Q. Who was the one who ordered you to go to the floor?
A. That I wouldn't know either.
[fol. 10] Q. How is the light in that place?
A. There was no light. It was 3:30 in the afternoon.
Q. Let me see. The present building that is there is not

the same one that was there at that time. There was a fire since. Is that correct?

A. But the same building is still there. The fire was inside.

Q. How wide is it across?

A. The dining room or tavern?

Q. The bar room.

A. The bar room? I should say 30 feet.

Q. How many windows were there in front?

A. Four windows.

Q. Which door did they come in if you know?

A. I don't know. I was in the kitchen.

Q. How many doors are there to the place?

A. Two.

Q. Was there one in front?

A. And one on the side.

Q. Was your television on that day?

A. Yes, sir.

Q. Were they watching the ball game through the television?

A. Yes, sir.

Q. You had venetian blinds on the windows?

A. At that time I don't think we had venetian blinds on the windows.

Q. With the television on did you have everything so arranged as to make the room as light as possible to watch [fol. 11] television?

A. I don't know. I wasn't there. I was in the back of the kitchen.

Q. But you did come in. Were the windows all up, the shades open?

A. I didn't pay that much attention.

Q. The television was on?

A. The television was on. The ball game was on.

Q. Between Cincinnati and the Giants?

A. I don't remember right offhand but it was a game.

Q. Were you interested in the ball game?

A. I was in the kitchen.

Q. You were in the kitchen only temporarily?

A. No, I was in the kitchen.

Q. Were you acting as chef?

A. That's right. I do my own cooking.

Q. Who was acting as the bartender?
A. There was nobody behind the bar at the time.
Q. How many customers were in there?
A. I should say about 8 or 9 people.
Q. I thought you said about 14 a little whole ago?
A. That's including people that came in.
Q. With 8 or 9 that would be 5 or 6 who came in?
A. That's right.
Q. Was the interior of the place very light?
A. The place is very light with four windows.
Q. But with the television on and with the shades pulled [fol. 12] down it is dark?
A. They might have been half down. I really don't know.
Q. So you would have had a good view of these people?
A. Of which people?
Q. That came in, the alleged bandits.
A. If I was standing behind the bar, yes, but I just walked out and that's all.
Q. You walked into the place from the kitchen?
A. From the kitchen into the bar.
Q. How did you get to the bar from the dining room?
A. There is two doors as you come out of the bar at that time to where the patrons were in front of the bar.
Q. Did you have to leave that main room and walk around into the dining room and come in?
A. No.
Q. In other words, your bar was facing north, right?
A. Yes.
Q. It was up against the wall?
A. That's right, sir.
Q. With a space between?
A. That's right, sir.
Q. And assuming that the bar were here—we are facing north—would the bar come all the way up against the wall?
A. No, sir.
Q. There was a space for you to come in front or did you have to go through the door to come around?
A. No, there is a space all around.

The Court: It might be helpful to the jury to have a [fol. 13] diagram showing the relative locations of the kitchen, the bar, and dining room.

Q. Could you draw a diagram?
A. I would not be able to draw a diagram of the bar.
Q. Could you draw a diagram of the place?
A. I can tell you as you go along about it.
Q. The jury was not there and would it be possible for you to draw a diagram if it is convenient?
A. I will try.

The Court: Is there any one in the courtroom who knows about this location?

Q. There has been a fire since, hasn't there?
A. Yes, sir.
Q. It was toward the front that the fire took place?
A. That's right.
Q. So it is rearranged now.
A. Yes.

The Court: My thought was we could have a diagram drawn and counsel agree that it is a fair representation and put it on the board.

Mr. Eisenstein: I have no objection to the witness trying to be a draftsman.

Mr. Cummins: I have no objection.

The Court: Step down to that paper and draw it.

The Witness: It is just a straight bar, that's all. If you [fol. 14] want this let's say this is the bar. It faces this way. This is the wall. There is a kitchen back here. You come out of the kitchen and there is a little—like this—you go all around. That's all there is to it.

By the Court:

Q. Where is the dining room?
A. The dining room is way off this side room altogether.
Q. Is there an entrance from the bar room into the dining room?
A. That is the side entrance.
Q. Could you draw it on that diagram?
A. The side entrance would be here and you come in here and the dining room is way off from the bar altogether

The Court: It isn't any clearer to me than it was before.

Mr. Eisenstein: It doesn't particularly matter. It isn't

in dispute. There is a bar, a kitchen and a dining room; I think the defense will admit that.

Mr. Cummins: I realize he is not a draftsman. I am a very poor one myself but I will try to clarify it.

By Mr. Cummins:

Q. When you say north, that is toward Palisades Park and Fort Lee?

A. That's right.

Q. Was the bar on the northern side or the southerly side [fol. 15] toward Jersey City? Is this the exterior of the bar?

A. That's right.

Q. Do you want to make the rest of it come this way, I presume, and up?

A. The building is about 200 feet long.

Q. 200 feet long?

A. The whole building is.

Q. In depth?

A. Thats' right.

Q. Is this Bergen Boulevard?

A. Bergen Boulevard would run just the opposite.

Q. Where would Bergen Boulevard be?

A. Bergen Boulevard would come down this way.

Q. Can we draw a line for Bergen Boulevard here?

A. That is Bergen Boulevard.

Q. You set how far back from Bergen Boulevard?

A. 25 feet.

Q. Would this be the entrance from Bergen Boulevard?

A. No. The entrance is here from Bergen Boulevard.

Q. So that Bergen Boulevard would be 20 or 25 feet from here, correct?

A. Yes.

Q. So that this would be looking east toward the Hudson River?

A. That's right.

Q. The bar would be back toward Ridgefield?

A. Back here. No, it would be toward Jersey City.

Q. If this is toward Jersey City——

A. That is the kitchen.

[fol. 16] Q. —and this is toward the Hudson River; there must be some confusion. Am I right on that?

A. I don't know.

Q. This is Bergen Boulevard.

A. Yes.

Q. If I may I will draw just a slight line.

A. I would say this starts my building coming over here. There is an entrance here from Bergen Boulevard. There is an entrance here from the side that comes in from the dining room.

Q. So the Hudson River would be over here due east. Is that right? And the Hackensack River would be over here due west.

A. Don't confuse me. I'm not talking about the Hackensack or Hudson River. I am trying to tell you what the place is. You are going to confuse me between the Hudson and Hackensack Rivers. I am trying to help you in this diagram.

Q. This is the Hudson River this way.

A. If this is Bergen Boulevard and you keep on going down you would get into the Hudson River.

Q. So that facing the Hudson River directly Jersey City would be to the right?

A. That's right.

Q. So that facing the Hudson River this way Jersey City would be down here, wouldn't it?

A. If you keep on walking all the way here it would be facing Jersey City.

Q. I am talking about Jersey City.

A. If I am this way facing the Hudson River in order to get to Jersey City you have to go to your right. That's [fol. 17] where my entrance comes, right here.

Q. With that in mind where is the bar?

A. Right back here. This is the bar.

Q. Then the bar is toward the west?

A. Toward Jersey City if you want to put it that way.

Q. Where are the windows in this place?

A. Two in the front facing Bergen Boulevard and two on this side here.

Q. Two here?

A. Right.

Q. This is your front entrance as you come out?

A. That's right.

Q. So that if you come out that front entrance and then

go directly right you go down toward Union City and Jersey City?

A. Jersey City, that's right.

Q. So isn't Jersey City down this way.

Mr. Eisenstein: If your Honor please, we know Jersey City is south of Fairview.

The Court: I will allow it.

Mr. Eisenstein: The State will admit that. I don't think the issue in this case is as to where Jersey City is.

The Court: Let us not have any side remarks. The only question is a simple problem. No objection has been made; so you may continue.

[fol. 18] Q. You say the bar is over this way?

A. That's right.

Q. If Jersey City is south this way the bar can't necessarily be that way but must be over this side?

A. No, I'm sorry. The bar is over here.

Q. It is on that side. So as you come in from Bergen Boulevard you would walk directly across to the bar?

A. Yes.

Q. This is east toward the river so you would be walking directly west. I don't want to confuse you, I might be myself, I am trying not to. Where is the kitchen with reference to the bar?

A. Right behind the bar.

Q. Would that be over here?

A. That's right. I would say over here with the partition.

Q. How would you come from behind the kitchen into the bar, what door would you say?

A. Two doors. There is a door right here. You would come out there and come into the bar. If you want to go to the dining room there is another door to turn left and go into the dining room. These are only partitions, not doors.

Q. You don't know whether this defendant wore glasses. Did any of the other hold-up men wear glasses?

A. I didn't have time for that.

Q. How many of the hold-up men did you see, Mr. Gal
[fol. 19] iardo?

A. Just the one that told me it was a stick-up.

Q. Was he the one that you say was about 6 foot tall?
A. Yes, sir.
Q. What sort of gun did he have?
A. An automatic.
Q. What color?
A. I believe it was black.
Q. What is an automatic? Is that a 38?
A. I think there is a 25 and 45 and 38.
Q. You are fairly familiar with guns.
A. I haven't the slightest idea. I mean I'm not a man with guns.
Q. Did he wear a hat?
A. I don't believe so.
Q. Do you know, Mr. Galiardo?
A. I don't.
Q. Did he wear a tie?
A. I don't know.
Q. What color shoes did he have, if you noticed?
A. I believe brown.
Q. Brown, white, or all brown?
A. Plain brown.
Q. Did he talk with a lisp or a firm voice?
A. I can't recall that.
Q. Was it a high voice or a guttural voice?
A. I don't know.
Q. Was it a foreign voice?
A. No, in plain English he said, "This is a stick-up."
Q. At that particular moment you were behind the bar. Is that right?
A. I was coming from out of the kitchen into the bar.
[fol. 20] Q. He said, "This is a stick-up". Did he hold the gun to you? How close did he come, Mr. Galiardo?
A. Face to face. When I turned my back he put the gun behind my neck.
Q. How far away was he at that time?
A. At what time?
Q. At the time he came close to you to put the gun behind your neck. Did he come within two feet of you?
A. We were very, very close to each other.
Q. You didn't recognize any of the other men?
A. No, I didn't have a chance to look.
Q. How long were they in the place?

A. I should say everything took less than ten minutes.

Q. You were then brought in and tied up?

A. I was tied up when he landed me on the floor.

Q. You what?

A. I was tied up when I was directed to lay on the floor.

Q. Was there anything prominent about the features of the man who said, "This is a stick-up"? Did he have big eyes, big mouth?

A. I didn't get a chance to look at him that close.

Q. Did he have any gold teeth showing?

A. I haven't the slightest idea.

Q. Do you know what color hair he had?

A. I think it was brown.

[fol. 21] Q. But you are not sure?

A. That's right.

Q. Do you know what color his eyes were?

A. No.

Q. Were there any scars or marks on him that you noticed?

A. I didn't have time to look at that.

Q. What kind of trousers did he have on, if you know?

A. I couldn't remember that.

Q. You saw the gun?

A. That's right. I felt it also.

Q. Mr. Galiardo, did he hold the gun in his right or left hand?

A. I believe it was the right hand.

Q. Did the hand show any sign of nicotine?

A. No, but the hand showed a sign of nervousness.

Q. Did he wear gloves?

A. No, I don't think so.

Q. Did any of them wear gloves?

A. I don't know.

Q. Did any of them wear moustaches or beards?

A. The fellow that confronted me had a very big heavy beard on.

Q. He had a very heavy beard, he needed a shave. What color would it be?

A. The beard?

Q. Light or dark?

A. I think it must have been black or brown but all I know he had a lot of whiskers on his face.

Q. Did he have any cigarette in his hand while he was there?

A. I don't believe so.

Q. Did he have any fraternity pins or other pins?

[fol. 22] A. Not that I noticed.

Q. Did he wear a pocket handkerchief?

A. Not that I noticed.

Q. Was he well dressed?

A. No, sir.

Q. Were his pants shiny or pressed?

A. I don't know.

Q. You don't know?

A. No.

Q. Was the fellow with the heavy beard the one who held the gun to you?

A. Yes, sir.

Q. Are you prepared to swear that that was Hoag?

A. I am not.

Mr. Cummins: That is all.

Redirect Examination.

By Mr. Eisenstein:

Q. I think you testified it looks like him.

A. Yes, sir.

Q. But you are not positive that is the man who did it?

A. That's right, sir.

Q. On cross-examination counsel said you were taken over to New York for the purpose of identifying this defendant.

A. That's right, sir.

Q. Were you shown a group of photographs?

A. Yes, sir.

Q. And asked to pick out the one that you thought was the man who held you up?

A. That's right.

Q. I show you this photograph and ask you whether [fol. 23] that is the photograph you picked out?

A. I did.

Q. Did you put your name on it?
A. I did.
Q. Is that the name that appears on the photograph?
A. Yes, sir.
Q. Is that the photograph of the defendant in this case, William Hoag?
A. It looks like it, sir.

Mr. Eisenstein: Is there any objection to offering this photograph?

Mr. Cummins: Yes, I have, your Honor. First we have a lot of notations on the back.

Mr. Eisenstein: We will black out all of that, if your Honor please. We will block it out.

Mr. Cummins: I object to it going in. I don't think it is proper proof of something he might have picked out at that time that he said he is not too sure. He might have picked out Robert Taylor or John Jones.

(Argument between Court and counsel).

The Court: Mr. Cummins, are you willing to admit that what he has shown to the witness is a photograph of the defendant?

Mr. Cummins: Yes, sir.

The Court: Is there any more significance attached to the photograph than that?

Mr. Eisenstein: No, sir, other than the fact that he was [fol. 24] taken to New York and identified this photograph as being that of the defendant.

The Court: Mr. Cummins is willing to admit the photograph is one of the defendant. I think with this admission there is no necessity for admitting it in evidence.

Mr. Eisenstein: Your Honor rules. Under those circumstances it is not necessary to offer it.

The Court: It is proper that you should offer it.

Mr. Eisenstein: I would like to offer it.

The Court: I think it is better I reject the offer because of what is on the back or face of it.

Mr. Eisenstein: I tried to block out the back of it so it cannot appear but if it were properly blocked out would your Honor admit it then?

The Court: I would have to see it first.

Mr. Eisenstein: May I ask your Honor to inspect it now so far as the back is concerned. I do not see how any one could possibly see anything through it.

The Court: You can still see enough of it to be prejudiced.

[fol. 25] By Mr. Eisenstein:

Q. In any event, you identified the photograph of this defendant over in New York. Is that correct, sir?

A. Yes, sir.

Mr. Eisenstein: And counsel admits that is a photograph of the defendant that was identified by the witness. Is that correct?

Mr. Cummins: No, sir.

The Court: I thought you did admit it.

Mr. Cummins: No, sir. I admit this is a picture of the defendant, not that the picture that was shown to him that he identified in New York was this defendant. In other words, I said after showing it to him is this your picture and he said yes. That is as far as my offer goes.

The Court: I think that ought to be sufficient from the standpoint of the State.

Mr. Eisenstein: You admit this is the defendant's picture?

Mr. Cummins: I admit this is a picture of this defendant.

The Court: Then it simply gets down to the question of credibility of the witness, which is a jury question.

[fol. 26] Mr. Eisenstein: May I proceed? I did not want to interrupt your Honor.

The Court: Yes.

By Mr. Eisenstein:

Q. This is the picture that you identified in New York as the man who stuck you up?

A. That is the picture that I picked out in New York.

Q. Now, Mr. Galiardo, how far is the front entrance door on Bergen Boulevard from the end of the building, approximately?

A. About 14 feet.

Q. About 14 feet?

A. No, I am wrong. It is about 10 feet.

Q. I mean on September 20, 1950.

A. About 10 feet.

Q. This then is Bergen Boulevard. Is that correct, sir?

A. Right.

Q. Running in that direction.

A. Yes.

Q. You say this is the entrance. Is that correct, sir?

A. Right.

Q. Then it is 10 feet to the end of the bar?

A. Right.

Q. This is the bar. Is that right?

A. Right.

Q. This is the kitchen?

A. Yes.

Q. And this is the dining room out this way.

A. Right.

Q. I assume there is an entrance into the dining room. Is that right?

A. Yes.

[fol. 27] Q. You say there are two or three entrances into the kitchen?

A. No. There is one entrance into the kitchen and two or three into the dining room.

Q. It is 10 feet from the door to the bar?

A. About.

Q. The bar is how many feet long, would you say?

A. Well, it used to hold 12 stools so it should be at least 12 feet.

Q. Talk louder, please.

A. They used to seat 12 stools.

Q. Tell me to the best of your recollection as of the date this occurred, which I believe was September 20, 1950, what was the length of the bar?

A. About 12 or 14 feet.

Q. Was it a right angle bar? Did it have a bend in the bar?

A. Two bends.

Q. So we have a bar that we will say is 12 or 14 feet.

Mr. Cummins: I would rather he draw a picture himself, Mr. Eisenstein.

Mr. Eisenstein: I am just doing what he said, if your Honor please.

Q. How long is the bend?
A. Three feet.
Q. On each side?
A. On each side.

Mr. Eisenstein: Any objection if I put in three feet?
[fol. 28] Mr. Cummins: Only three feet, yes.
Mr. Eisenstein: I think that is all.

Re-Cross-Examination.

By Mr. Cummins:

Q. Mr. Galiardo, you have put the dining room here.
A. That is where the dining room is.
Q. Is the bar room today where it was then?
A. Yes, sir.
Q. As you come in from Bergen Boulevard and I am walking through this door I walk toward the Hackensack meadows, don't I, due west?
A. That's right.
Q. And your dining room overlooks the Hackensack meadows, doesn't it?
A. Please don't try to confuse me. That is where the dining room is. I'm not an architect or anything like that.

Mr. Eisenstein: Mr. Galiardo, hold it a minute until I make an objection. I don't know where the Hackensack meadows are myself, if your Honor please.
Mr. Cummins: Yes, you do.
Mr. Eisenstein: I don't think it has anything to do with this case. I don't think the witness should be confused.
The Witness: You confuse me.
The Court: I will allow it.
[fol. 29] Mr. Eisenstein: I think he ought to ask the witness if he knows where the Hackensack meadows are.

Q. Don't you know where the Hackensack meadows are?
A. I don't know.

Mr. Eisenstein: That answers the question.

Q. How long have you lived in Fairview?
A. 40 years.

Q. And you don't know where the Hackensack meadows are?

A. I know where the Hackensack River is. I don't know anything about the meadows.

Q. We will talk about the river then. As I come in from Bergen Boulevard and walk westerly generally am I walking toward the Hackensack meadows or river?

A. If you walk into my tavern and there was nothing there and you kept on walking you would walk into the river.

Q. The river would be over here?

A. No, I don't think so. The river would be up there by the dining room.

Q. Here is Bergen Boulevard and you walk from Bergen Boulevard into your tavern. Bergen Boulevard runs generally north and south, doesn't it?

A. That's right.

Q. Your entrance is definitely on Bergen Boulevard.

A. That's right.

Q. So if you walk into your entrance you walk due west, westerly generally would be toward the Hackensack River.

A. I don't know. I haven't the slightest idea.

[fol. 30] Q. You would walk toward the Hackensack River.

A. The Hackensack River is on the other side of the dining room.

Q. Over here?

A. That's right.

Q. Would that be where the Hackensack River is?

A. That's right. You say you are walking toward Bergen Boulevard this way and in order to get—may I go over there?

Q. As a matter of fact, this is over toward the George Washington Bridge, isn't it?

A. This is Bergen Boulevard. You walk in there. You have to turn and start going like this. You are walking this way. Bergen Boulevard gets into my place. You go this way and walk into the tavern, the dining room is that way.

Q. Which way would you go to the George Washington Bridge on Bergen Boulevard?

A. The opposite.

Q. Would it be this way, this way, or that way?
A. That way.
Q. Put it on the diagram.
A. You go this way.
Q. Toward the George Washington Bridge?
A. Right.
Q. Which way is Fort Lee?
A. Toward the George Washington Bridge.
Q. As a matter of fact, isn't this Cliffside Park and Fairview over here?

Mr. Eisenstein: If your Honor please, I object.
[fol. 31] The Court: I will allow it.

Q. As you walk out your front door and you stand on Bergen Boulevard which way would you be facing?
A. You would be facing just the way I am facing now.
Q. What town would you face?
A. Fairview.
Q. That is right here?
A. That's right.
Q. So that the George Washington Bridge couldn't be over that way, could it? It would have to be up toward here.
A. If you ask me if I went up Bergen Boulevard how would I get to the George Washington Bridge? I said that way.
Q. Bergen Boulevard runs this way and that way. Isn't this Hudson County Boulevard and here going up toward the bridge you turn right?
A. Bergen Boulevard and Hudson County Boulevard are not the same way. They run into each other.
Q. Where do they run into each other?
A. In Hudson County.
Q. Down here or up here?
A. Down further toward Jersey City this way.
Q. That way?
A. Right.

Mr. Eisenstein: I object. The jury knows where Bergen Boulevard is. I think the purpose of the cross-examination is to confuse the jury on a geographical question. I don't [fol. 32] think it belongs in the case. I don't think where

the Hackensack River or the George Washington Bridge is has anything to do with it.

The Court: There is no occasion for counsel on either side to sum up until the case is over. There will be a short recess. The jury may retire.

(Recess).

(After recess).

(The Clerk polls the jury).

By Mr. Cummins:

Q. You have been shown a picture that you said looks like this defendant that apparently was shown to you by the police, the picture you were shown just a moment ago.

A. Yes.

Q. When and where were you shown that photograph?

A. Center Street Police Station in New York.

Q. Had you been shown other pictures there that day?

A. I looked throu h a lot of pictures.

Q. All types and sizes?

A. Right.

Q. Were there several that you picked out that might have looked like him?

A. Just one.

Q. In other words, that is the only one that you picked out?

A. That's right.

Q. Do you know when that was?

A. No, I don't.

Q. How long after?

A. I don't know.

[fol. 33] Q. You don't know?

A. I don't remember.

Q. Would it have been a week after?

A. Could have been a week, could have been a couple of days. I haven't the slightest idea.

Q. It could have been a month?

A. It might have been a month.

Q. And that was the only picture that you picked out that looks like him.

A. That's right.

Q. After that you were taken to some police line-ups?
A. That's right.
Q. How soon after that were you taken there?
A. Quite a while.
Q. Where?
A. New York. I don't know what that was now.
Q. How many times were you taken to line-ups?
A. I think twice.
Q. How many generally would be in the line-up?
A. Anywhere from 10 to 15.
Q. Would they all be about the same size or various sizes?
A. No, various sizes.
Q. Did you see this defendant Hoag?

The Court: Didn't you go over that before?
Mr. Cummins: Yes, sir, on cross-examination.
The Court: You did on your previous cross-examination.
[fol. 34] Mr. Cummins: Your Honor, this has been brought out and I want to show why after having seen this picture he wasn't able to identify him in the line-up, which would be a natural thing if he had been in there.
The Court: He already testified he did not identify the defendant as being in any line-up.
Mr. Eisenstein: There is no evidence that this defendant was in a line-up.
The Court: That's right.

By Mr. Cummins:

Q. Are you related to the Chief of County Detectives over there?

Mr. Eisenstein: I object to the question, if your Honor please.
The Court: Objection sustained.
Mr. Cummins: That is all.

By Mr. Eisenstein:

Q. Now, Mr. Galiardo, in reference to this sketch here, where is Bergen Boulevard?
A. Bergen Boulevard runs north and south.
Q. Can you come to the board and show me how Bergen Boulevard runs?

Mr. Cummins: I object to that. He has been over it half a dozen times.

[fol. 35] The Witness: There is an error on that board, your Honor.

Mr. Cummins: You drew it.

The Witness: That's right. I said I wasn't qualified. I tried to help out.

By the Court:

Q. Suppose you point out what you consider the error.

A. This here is Bergen Boulevard. This here is a parking lot.

By Mr. Eisenstein:

Q. Mark it with a "P" for parking lot and draw a line showing where Bergen Boulevard is?

A. Bergen Boulevard runs this way.

Q. And that runs north and south?

A. Right.

Q. Which way is the George Washington Bridge?

A. North and south this way, toward north.

Q. Show an arrow toward the north.

A. Yes.

Q. Now you can go back to your seat.

A. That is a parking lot.

Q. You are sure you didn't notice there was nicotine on his fingers as he held the gun?

A. No, I don't remember that.

Mr. Eisenstein: That is all.

By Mr. Cummins:

Q. You have changed Bergen Boulevard to the place now [fol. 36] where you have the error. Do you still wish to leave the entrances one from the parking lot and one from here? Are those entrances correct now?

A. May I go up there again?

Q. Yes. Here is the entrance from the parking lot and the entrance to the bar.

Q. Now just X out the old ones. Just put a line through the old ones.

A. It is practically the same thing.

Q. How about this one? Is this the same here?

A. No, that can't stay.

Q. That can't stay?

A. That's right. Mark it Bergen Boulevard.

Q. Just go back to the stand. Now, the dining room is in the rear?

A. Directly behind the bar.

Q. And toward the Hackensack River or the Hackensack meadows.

A. Right, Hackensack River.

Q. You were wrong before when you said Jersey City was this way.

A. Well, going north and south.

Q. I mean that was changed. If Bergen Boulevard were running there as you said previously and as you put the entrance——

A. I put Bergen Boulevard with a straight line. It should have been north and south. Now, standing the way you are facing me if you would walk that way you go toward Jersey City.

[fol. 37] Q. You were wrong on those other things before?

A. I was wrong in the direction.

Q. Did you talk to somebody since you left the stand?

A. Did I talk to somebody? No, I didn't talk to anybody but I seen I have the line going east and west instead of north and south. You confused me up there. I said before and I want to say now I am not an architect. I was trying to help out.

Q. You have lived 40 years in Fairview?

A. 40 years, that's right.

Q. You were confused about the location?

A. This is the first time I ever made any sort of drawings in front of you people.

Mr. Cummins: Nothing further.

ANTHONY DOTTINO, sworn.

Direct examination.

By Mr. Eisenstein:

Q. Where do you live, Mr. Dottino?
A. 317 Eighth Street, Fairview.
Q. What is your occupation?
A. Milk man.
Q. Was that your occupation on September 20, 1950?
A. Milk man, that's right.
Q. Do you know Gay's Tavern on Bergen Boulevard in Fairview?
A. Yes, I do.
Q. Did you have occasion to visit the tavern?
[fol. 38] A. I went in to collect a milk bill. I was having——
Q. Hold everything.
A. You want me to hold my hand up?
Q. On September 20, 1950, did you go into the tavern?
A. That's right.
Q. What time of the day or night did you go in?
A. September 20th after 3.
Q. While you were in the tavern did anything happen?
A. There was a stick-up.
Q. Describe to the Court and jury just what you mean by "There was a stick-up."
A. I was watching television. I was sitting on this stool this way and the television is in the corner. A fellow come in the front door, a tall fellow, dark complexion, with a little black gun. So I was never in a thing like this, I didn't know what it was. So I was sitting on the stool. I was watching baseball. So the guy comes in from the back, taps me on the shoulder and says, "This is a stick-up." So I walked over to the wall and put my hands up.
Q. How many fellows had guns?
A. Three of them.
Q. You went to the wall. Is that what you said?
A. I went to the wall where the television is with my hands up.
Q. What happened after you went to the wall?
[fol. 39] A. They took my money.

Q. What happened after that?

A. I turned around and the fellow gave me a smack in the face. I said "Don't harm me, take my money and don't harm me."

Q. Were you in fear?

A. Sure I was in fear. I was never in a thing like this.

Q. Did they send you in another room?

A. After they took the money from us we went in the back room.

Q. What happened in the back room?

A. We had to lay on our stomachs and they tied us with rope, cord.

Q. I beg your pardon?

A. They tied us with rope.

Q. I assume you were ultimately released from the rope. Is that correct, sir?

A. Yes.

Q. Were you able to identify this defendant as being one of those involved in the stick-up?

A. Well, I signed the paper. He come the next day—I don't know who he was—they come into that tavern and he showed us a picture and I was all upset and I signed that fellow's picture, had him present there.

Q. You what?

A. I say I seen different pictures. He showed me pictures.

By the Court:

Q. How many pictures did he show you?

A. I don't know, all different pictures. He had a booklet with him. He showed this picture and this picture.

[fol. 40] By Mr. Eisenstein:

Q. Did you pick out this defendant's picture?

A. I picked it out, yes, but I'm not sure.

Q. You are not sure?

A. No.

Q. I show you this picture, sir, and ask you whether this is the picture that you identified as the defendant Hoag?

A. It looks like the man but I'm not positive.

Q. Does that look lke the man who was one of them?

A. No, it doesn't. The fellow come in the front door——

Q. Just let me finish the question.

A. I want to answer what you want to ask me.

Q. Look at this picture.

A. I will look at it, sure. It looks like the man but it isn't him.

By the Court:

Q. Is that your signature?

A. I signed it, like I told you before. He come in with pictures. I picked this fellow. I signed it.

By Mr. Eisenstein:

Q. Did you identify this picture as being one of those involved in the stick-up?

A. I'm not positive, I'm not sure.

Mr. Eisenstein: Cross-examine.

Cross-examination.

By Mr. Cummins:

Q. Was the previous witness there when you picked this one out?

A. Yes.

[fol. 41] Q. You were both there?

A. That's right.

Q. Did you go over to the line-up in New York?

A. I think I was over once—I'm not sure now—once or twice.

Q. Were you able to pick the man out of the line-up?

A. He wasn't there that stuck us up.

Q. Or if he were there could you recognize him?

A. He wasn't there. I don't know.

Q. You say this is not the man?

A. No.

Q. The man that held you up?

A. No. The fellow that held us up was darker, thin, weighed about 160 or 165 pounds, thin, come in with a brown jacket he had on.

Q. This is not the man?

A. No, definitely it isn't him. He was darker than him.

Mr. Eisenstein: I will plead surprise to that, if your Honor please.

By Mr. Eisenstein:

Q. You signed a statement?
A. I signed a statement with Mr. Gay present.
Q. Just answer the question, please.
A. Go ahead.

Mr. Cummins: May I object to your Honor? I think the Prosecutor has to show that he has a reason to be surprised. I think the Prosecutor must show the grounds for his surprise, that someone talked to him, that he could have [fol. 42] talked to him and found out this story, that it didn't just pop out at this particular moment. The Prosecutor says he is surprised. I don't think that is sufficient, if your Honor please, for him to just say, "I am surprised."

The Court: How is he going to show surprise?

Mr. Cummins: I believe there are ways.

The Court: You think he should be put under oath to say, "I am surprised"?

Mr. Cummins: No, sir, but the law sets forth methods by which you can show you are surprised by the testimony. You are under an obligation to talk to these people to find out. In other words, he could have spoken to this defendant in preparing his case a week ago and found out. That would be laying the groundwork for surprise as I understand the criminal law.

The Court: I don't understand there is any obligation on the part of the Prosecutor to talk to a witness a week before trial or any other particular time. I would seem to me that the facts developed so far would indicate that Mr. Eisenstein is right in pleading surprise.

Do you intend to prove the witness made some other statement at some other time?

[fol. 43] Mr. Eisenstein: Yes, if your Honor please.

The Court: Then he tells the jury now. Whatever the witness may have said on some previous occasion when he was not under oath is not evidential.

The Witness: I am telling the same story.

The Court: Will you please keep quiet.

The Prosecutor pleads surprise. That means that he personally is surprised at the testimony given by the witness and he wants to show the witness made a contradictory

statement at a previous time. Bear in mind the only reason for admitting such evidence is to neutralize what he has said under oath from the witness-stand. It is for the jury to say whether the effect of such statement neutralizes the testimony given today, but in any event what he said when he was not under oath is not evidence against the defendant. You may proceed.

Mr. Cummins: May I have an objection to this line of questions without taking it every time?

The Court: Yes.

By Mr. Eisenstein:

Q. I think you said you identified this photograph as being one of those involved in the hold-up?

A. Look, I'm not positive, like I told you three or four [fol. 44] times that you had me here.

The Court: Answer the question.

The Witness: I am answering the question, your Honor.

The Court: Don't argue.

Mr. Cummins: I interpose the further objection now, your Honor, since his answer is "I told you three or four times." I think that would neutralize any surprise. As I understand surprise on a question of law it must be something he had no reason to anticipate.

The Court: It is not clear to me what he told him or when he told him. Have him answer the question so that we can get this straight and proceed in an orderly fashion.

By Mr. Eisenstein:

Q. You identified this photograph as being one of the men involved in that stick-up?

A. I'm not positive.

Q. Did you identify this photograph?

A. I picked him but I'm not positive. It looks like the man but he is not the man.

The Court: Don't argue; just answer the question.

By the Court:

[fol. 45] Q. Isn't it a fact that at some previous time you did identify the photograph as being the man who stuck you up?

A. I did.

By Mr. Eisenstein:

Q. Now you say you are not positive?

A. I'm not positive.

Q. Then I think in response to counsel's question on cross-examination you said that is definitely not the man?

A. Definitely, because the fellow that stuck us up was dark. The fellow that stuck us up was dark, very dark.

Q. Please answer the question, Mr. Dottino. You said you are not positive and now you say that is definitely not the man?

A. Definite.

Q. Definitely not the man?

A. Definite, that's right.

Q. I show you a statement dated July 24, 1951 made to Detective Carl De Marco by one Anthony Dottino and I ask you whether you are the Anthony Dottino who appears on this statement. Is that correct, sir?

A. That's right.

Q. Is that your signature, sir?

A. That's my signature.

Q. At that time did you say as follows: "That photograph you show me is the one you showed me and others [fol. 46] several days after the hold-up."

Is that correct, sir? Isn't that what it says? Can you read, Mr. Dottino?

A. I can read, I can read. I went to school.

Q. "He is the man who came in the front door with a gun and lined everybody against the front window wall."

Is that what you said at that time?

A. I don't remember now.

Q. Wasn't the question put to you: "Will you put your signature on the photo I show you if he is the man you identified"?

Then didn't you answer to that, "Yes. I'll do that"?

A. Listen, I was all upset. Your Honor, I didn't know what I was doing.

By the Court:

Q. You were not asked whether you were upset or not. You were asked whether you made this statement.

A. The day when this detective, De Marco, come there I was all upset. I don't know what I was signing.

Q. Once again I tell you you were not asked whether you were upset or not. You were asked whether you made this statement.

A. Yes, I made the statement.

By Mr. Eisenstein:

Q. I call your attention, Mr. Dottino, the fact that this statement was made July 24, 1951. Isn't that correct, sir? [fol. 47] A. Yes, sir. I guess so. I don't know. It is marked there.

Q. It is marked July 24, 1951. You also put the date on this photograph, did you not?

A. I don't remember the date.

Q. Look at it and tell me whether the date is on it?

A. I don't know the date that was on there.

Q. Will you look at it?

A. It is 7/26.

Q. July 24th, isn't it?

A. July 24th? I don't see July 24th.

Q. What do you see?

A. I see 7 and 2, that's all I see.

Q. You can't see the rest?

A. No.

Q. This stick-up took place in September of 1950, did it not, sir?

A. September?

Q. September 20, 1950?

A. I don't know what month it was.

Q. It was 7 or 8 or 9 or 10 months before you made this statement. Isn't that correct, sir?

A. I didn't get you.

Q. I say the stick-up took place in September and this was made on July 24, 1951. Were you still excited on July 24, 1951?

A. I forget everything. No, why should I be excited, for what? Thank God I'm here today, thank God.

[fol. 48] Q. My question to you, sir, is were you still excited on July 24, 1951 when you made this statement?

A. I can't get it.

Q. You don't understand my question, sir?

A. No, sir.

Q. I understand from your testimony that you were excited on September 20, 1950.

A. Would you be excited, your Honor?

Q. Yes, I would.

A. You bet your sweet life you would.

Q. You were excited on September 20, 1950, were you not?

A. Sure I was.

Q. My question to you now is were you still excited on July 24, 1951, some nine months later when you made this statement? That is my question.

A. Counsel, I don't understand what you are driving at.

Mr. Eisenstein: I have no further questions of this witness.

Mr. Cummins: No further questions.

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Patsy Cascio, sworn.

Direct Examination.

By Mr. Eisenstein:

Mr. Cascio, what is your address, please?

A. 382 Walker Street, Fairview, New Jersey.

[fol. 49] Q. Do you remember September 20, 1950?

A. Yes, I do.

Q. Did you have occasion to visit Gay's Tavern on that day?

A. That's right.

Q. As I understand that was in the afternoon. Is that correct, sir?

A. That's right, sir.

Q. Were you on the premises?

A. Yes, I was watching television at the time.

Q. You were watching television?

A. Yes, that's right.

Q. As I understand it, something happened in there. Is that correct?

A. That's right.

Q. Tell the Court and jury in your own words just what happened while you were watching television in Gay's Tavern?

A. While I was watching television there was a stick-up in the place.

Q. Where were you at the time of the stick-up?

A. Just facing this side.

Q. Did somebody say anything to you?

A. No. I heard a man say, "It's a stick-up."

Q. Did you see anybody?

A. I noticed one fellow about 45 or 46 years old.

Q. You just noticed one fellow in the stick-up?

A. That's right.

Q. That's all you noticed?

A. That's right.

[fol. 50] Q. Did he have a gun?

A. Well, there was a couple of fellows there but this one particular fellow I saw.

Q. That is what I am driving at. You say there were a couple of fellows there?

A. That's right.

Q. Were they part and parcel of this stick-up?

A. I guess they were. I believe they were.

Q. Were they with the man with the gun?

A. Well, they might have been. I'm pretty sure.

Q. Were they patrons in the tavern? Were they drinking at the bar?

A. No.

Q. Did they come in with the man with the gun?

A. I guess so.

Q. How many came in?

A. Well, there might have been maybe two or three.

Q. You are not sure?

A. No.

Q. How many guns did you see?

A. Just one.

Q. Just one gun?
A. Just one gun.
Q. What did the man with the gun say to you?
A. All I heard "It is a stick-up," and they told us to get up against the wall.
Q. Did you get up against the wall?
A. I did.
Q. Was anything taken from you?
A. I had a birthstone ring and $25.00 cash.
Q. Was it a gold ring?
A. It was gold with a birthstone.
[fol. 51] Q. What was the value of the ring, approximately?
A. About $205.00.
Q. About $205.00?
A. That's right.
Q. I think you said you had $25.00 in cash. Is that correct, sir?
A. About that, yes.
Q. Were you in fear as a result of this stick-up?
A. I was.
Q. Are you able to identify any person or persons who participated in this stick-up?
A. Oh, yes.
Q. Can you identify anybody?
A. I certainly could.
Q. Will you do so?
A. Well, if that's the man, why, I would be too glad to.
Q. Do you see the man?
A. No, I don't see the man.
Q. He is not in Court today?
A. No, he is not in Court today.
Q. You cannot identify him?
A. That's right.
Q. Is that because you didn't get a good look at him or because you can't identify him?
A. Well, I can't identify him.

Mr. Cummins: I object to that. He has his statement that he is not. That is sufficient.
The Witness: The man is not in Court.

Q. You don't see the man in Court?
A. That's right.

Mr. Eisenstein: I have no further questions.

[fol. 52] Cross-Examination.

By Mr. Cummins:

Q. The television was on. Was the room dark or light?
A. Well, it was during the day.

Mr. Cummins: No further questions.

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Louis Capezzuto, sworn.

Direct Examination.

By Mr. Eisenstein:

Q. Where do you live, Louie?
A. 320 Ninth Street, Fairview.
Q. Were you in the tavern?
A. No. I was coming into the tavern about 3:30, and I come in the front door and as I did the fellow hit me from the back with a gun, caught me and said, "Stick 'em up." So I put my hands up. He went through my pockets, took my money, walked me to the back and another fellow made me lie down on the floor and tied me up.
Q. How many fellows were there?
A. I seen three.
Q. What door did you come in the tavern?
A. In the front door off Bergen Boulevard.
Q. Were you directed afterward into the rear room?
A. Into the back room.
Q. And told to lie down on the floor?
A. That's right.
Q. Were your hands tied?
A. They were tied behind my back.
[fol. 53] Q. How much did they get out of you?
A. $293.00.
Q. $293.00?
A. Right.

Q. Were you in fear as a result of this?
A. I tell you it hit me so fast I didn't know what happened. When I first walked in I thought it was a joke until I walked in the back room and I seen all these other fellows laying down. Then I realized it was serious.
Q. Then it was no longer a joke?
A. It was a joke no more.
Q. Then you were in fear?
A. Naturally.
Q. Were you able to identify any one?
A. If I see the fellow I would.
Q. You can't identify the fellow today?
A. He is not here.
Q. Is there any reason why you can't identify the fellow today?
A. No reason. That's not the man. I could really identify the fellow because the fellow put the gun in my head.
Q. Are you afraid of this defendant?
A. Why should I be afraid of him?
Q. I am asking you.
A. I'm asking you why should I be afraid of him?
Q. Answer the question, please.
A. I'm not afraid of him or anybody else.

Mr. Eisenstein: Cross-examine.

[fol. 54] Cross-examination.

By Mr. Cummins:

Q. You are not afraid of this man trembling alongside of me, are you?
A. I'm not afraid of him, no.
Q. You had a chance to see the man coming in?
A. I did.
Q. You say it isn't this man?
A. It isn't this man, definitely not.

By the Court:

Q. You spoke of two men. I think there was one as you came in the door.
A. That's right. He got me from the back.

Q. Then I think you said another man escorted you in the back room?

A. That's the gun. I could really identify the fellow who put the gun to my head. He said, "Get in the back, lay down."

Q. The man met you in the door?

A. I didn't see him because as I opened the door I got it from the back.

Q. You couldn't identify him at all?

A. No, not at all.

Q. You say there was a third man there too?

A. There was three as far as I seen because as I walked to the back there was one fellow by the kitchen door.

Q. Could you identify the third one?

A. No, I don't think so.

Q. Of the three you think you could identify the man [fol. 55] that stuck the gun in you as you went toward the back room?

A. That's right.

The Court: Proceed.

By Mr. Cummins:

Q. And you didn't see this man there that day?

A. That's right.

Mr. Cummins: That is all.

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[fol. 55-a] (At this point is inserted the transcript of testimony of Elmer S. Yager, which was previously furnished to the Court on October 12, 1955, and numbered on the right pages 3 to 43 inclusive).

[fol. 56] Court House, Hackensack, New Jersey, May 26, 1952

ELMER YAGER sworn.

Direct Examination.

By Mr. Eisenstein:

Q. Mr. Yager, where do you live?
A. Fort Monmouth.
Q. Where did you live in September 20, 1950?
A. Fort Monmouth.
Q. Did you have occasion to be in Fairview on September 20, 1950?
A. At that time I was driving in from New York to my grandmother and aunt's house up in the Bronx she lives. So I was coming back across the George Washington Bridge which I usually do and coming down on Bergen Boulevard and at that time I had to go to the men's room. So I noticed this tavern on the side and I stopped into the place and ordered a beer as I didn't want to go to the men's room without ordering a beer. So I had a beer.
Q. Speak slowly and louder.
A. I had to go to the men's room. So I seen this tavern on the side of the road. So I stopped. When I went in I ordered a glass of beer. Then I went to the men's room. I came back and finished the glass of beer and the television was on in the corner and there was a ball game going on. I was watching the ballgame for a while. Then I ordered another glass of beer.
[fol. 57] Where I was sitting was right next to the door, the front entrance to the tavern. I was watching the game sideways like this toward the television. I noticed the front door open and this tall gentleman walked into the place and he had a gun in his hand and he says, "This is a stick-up."

So I didn't pay any attention to him at first. Then he come over and pushed me on the side.

He said, "This is a stick-up," and pushed me over to the side and told me to stand up against the wall, which I did. They lined us up against the wall. I noticed another man coming in the rear door. He was an elderly gentle-

man, had black hair and had a German Luger in his hand; he was guarding the back entrance. Then I went toward the wall. There was another man went behind the bar room to the cash drawer.

Q. Is that the third man?

A. Yes, that's the third man.

Q. Go ahead.

A. He went to the register and took money out. Then they made us put our hands up against the wall—they stood us against the wall—and they searched us and they searched me.

After they got through searching me and some other fellows—I don't know who else was sitting next to me—well they made us go into the back room and I was pretty scared, [fol. 58] I never had a gun shoved in my belly before. Then they put us in the back room and they tied up all the fellows and they came to me last and they wrapped the cord around my wrists with my hands in the back. So I had a good wrist watch which my wife just gave me the following Saturday, or the previous Saturday before that due to the fact that it was my birthday my wife paid out somewhere in the neighborhood of $78.00 for the wrist watch, and I had my wallet on me; there wasn't much cash in it, only about $18.00. They took my wrist watch off and took my wallet out. They ripped the telephone out of the booth. Then they left the place and I was able to get my hands free right away. Then I ran across the street into the laundry shop there and I asked them if I could use the 'phone and I told them what happened. Then I called up the police, that was about all.

Q. Now, Mr. Yager, do you see the man in the court room that stuck the gun into you?

A. Yes, I do.

Q. Will you get off the stand and put your hand on his shoulder?

A. Yes.

Q. Go back to the stand, please. Will you show me what part of your body he stuck the gun into? Was it your face, neck, head, ribs?

A. Over here, in here.

Q. In here?

A. Yes.

Q. That was this defendant Hoag?

A. Yes.

[fol. 59] Q. What did he say to you?

A. He said, "Get over and stand up against the wall there," which I did.

Q. Were you able to recognize to any extent what kind of gun he had in his hand?

A. It was a small type gun. I don't know what kind it was.

Q. You don't know what kind it was?

A. No, I don't.

Q. Had you seen this man before the stick-up, Mr. Yager?

A. When I first come in there was a tall fellow sitting down at the end of the bar that seemed to be the same description of him there and he left. Then later on the hold-up occurred.

Q. And he came back?

A. Yes.

Mr. Eisenstein: Cross-examine.

Cross-Examination.

By Mr. Cummins:

Q. Do you know Bergen Boulevard well, Mr. Yager?

A. Oh, yes. I have been traveling up in that part of the country quite often up to New York.

Q. What is your business?

A. At the present?

Q. No, at that time.

A. At that time I was a shoe salesman.

Q. A shoe salesman?

A. Yes.

Q. For wholesale houses?

A. No, a concern up in Boston, the Tanner Shoe Company.

Q. You would have certain customers to call on?

[fol. 60] A. Later on.

Q. I mean at that time, Mr. Yager.

A. No. At that time I wasn't working Bergen County.

Q. You were not working Bergen County?

A. No.

Q. Is your work calling on shoe stores or is it on individuals?

A. Individuals.

Q. Would you carry with you the samples?

A. Yes. I carry a sample case.

Q. Did you bring the sample case into the tavern with you?

A. No, not at that time, not at that time.

Q. Ordinarily would you solicit trade in taverns?

A. No, very seldom, unless I got friendly with the guys.

Q. Unless you got friendly?

A. Yes.

Q. You are now down at Fort Monmouth?

A. Yes.

Q. Or is it Port Monmouth?

A. Port.

Q. How long have you lived there?

A. About six or seven years.

Q. Before that where did you live?

A. Connecticut.

Q. Have you ever been convicted of a crime?

A. No, never have.

Q. How long had you been in that business of selling shoes?

A. On and off when the painting business was slow I used to do the shoe work.

Q. Was your daily trip to various places and going [fol. 61] from house to house or did you go into taverns to solicit, or clubs, or the like of that?

A. Well, I would cover as much people as I could house to house and different ones.

Q. You didn't bring your samples with you that day?

A. No. I have had it with me but at that time I didn't bring it into the tavern.

Q. Had you had it with you for the purpose of soliciting business that day?

A. No.

Q. If you saw people that were friendly there would you have brought it in?

A. No, because I have never been there before. That was the first time I was in that tavern.

Q. Is it your practice to visit these places and become friendly and come back later and solicit?

A. If I go into a tavern and used to be in there making the rounds, if I'm thirsty for a glass of beer, if I have my shoe case along with me, while I have it in there if anybody was interested in a pair of shoes I would be willing to take their order and send it in.

Q. This particular day you had a glass of beer?

A. Yes.

Q. And your sample case was out in the car?

A. Yes.

Q. Was it your intention to bring it in after you became acquainted?

[fol. 62] A. No, because I was on my way home. I was in the Bronx visiting my wife's grandmother who happened to be in her late 80's and we have been taking care of her for the last seven years.

Q. And there was a man there who seemed to be the same description before?

A. Yes.

Q. Why do you say seemed to be?

A. It is my best belief. I think it was the same man.

Q. Well, do you know?

A. Because he had the same jacket on.

Q. Why did you say seemed to be in the first place and then afterward say he is the man.

Mr. Eisenstein: That isn't so.

The Court: I don't think that is what he said.

A. I didn't say that.

Q. Didn't you say he seemed to be the same description, referring to the man who had been there before?

A. As I said previously when I entered——

Q. Just yes or no. Did you say seemed to be the same description?

A. Phrase that a little better.

Q. You say there was a man there who had left while you were in there?

A. There was a man in there when I first entered the

tavern, sitting at the end of the bar. He had a glass of beer in front of him.

Q. You said he seemed to be the same description?

A. At that time I didn't take too much notice to the man.

[fol. 63] Q. But you weren't sure he was the same man at that time?

A. Not until when the hold-up occurred.

Q. But you are talking now about things in the past and you say that that man seemed to be the same description.

A. Well, when I go in a tavern I don't take notice of everybody that's in the place but this man as I was sitting at the end of the bar——

Q. The reason——

Mr. Eisenstein: Let the witness answer the question.

Mr. Cummins: I don't think it is responsive.

The Court: I suppose you are asking comment from the witness and he gave it to you.

Q. Did you say on direct testimony that the man who was there when you first came in seemed to be the same man?

Did you use the words "seemed to be"?

A. I believe I did.

Q. Did you say seemed to be the same description?

A. I noticed that man down at the end of the bar.

Q. No, did you say that in your direct examination?

A. Yes.

Q. All right. Now, are you prepared under oath to say that the man that was there actually was the same man, Mr. Yager?

A. No; I wouldn't say actually, no.

Q. Then you won't say actually.

A. No.

[fol. 64] Q. You are under oath?

A. I am swearing under oath that the man that held me up happens to be sitting in this court room.

Q. Now you come to something else. We talked about the man that was there before that left and you said seemed to be the same description. I asked you whether or not—correct me if I am not asking it correctly—I asked you whether or not you are prepared to say under oath that

the man who left at that particular time was this man and you said no, not actually. Is that right?

A. I wouldn't be too sure about that.

Q. Now, do you wear glasses?

A. No, I don't.

Q. Never wear glasses?

A. No, I haven't.

Q. This man that you now identify as Hoag, which door did he come in?

A. Front entrance.

Q. The front entrance?

A. Yes.

Q. On Bergen Boulevard?

A. That's right.

Q. How close to him were you?

A. There was only a few feet between the front entrance of the door to the bar. There was only a few feet and I was sitting on the corner of the bar there. That man had to face me to come into the place.

Q. He came in with the gun in his hand?

A. That's right.

Q. Which hand would you say it was in?

[fol. 65] A. I didn't take notice.

Q. Do you know whether it was the left or right hand?

A. I didn't take notice. I was too dog-gone scared. I never had anybody point a gun at me.

Q. Now, didn't you testify that a tall man walked in, that you were looking at television, that you paid no attention?

A. That's right.

Q. Did you testify to that?

A. I testified.

Q. Yes or no. Did you testify that a tall man walked in with a gun and said, "This is a stick-up", and you paid no attention?

A. That's correct.

Q. Now, you were not excited then because you were not paying any particular attention to him when you saw him with the gun, the tall man?

A. I thought the guy was kidding but then I seen other men come in the side door with guns in their hand.

Q. But you apparently had never seen this man before.

Is that right? You don't know which hand he had the gun in?

A. No, I didn't take notice which hand he had the gun.

Q. Were his hands covered with nicotine?

A. I don't look for that when you got a gun in your ribs. You don't look around what kind of hands he has got.

Q. How tall would you say this man was?

A. Around six feet.

[fol. 66] Q. What would you say he weighed?

A. Around 162, 165.

Q. How old would you say he was?

A. Between 23 and 24. I ain't that good of a guesser.

Q. Did he wear glasses that day?

A. I didn't see him wear glasses.

Q. You didn't see him wear glasses?

A. I didn't see him wear glasses.

Q. Did he, Mr. Yager?

A. I did not see him wear any glasses.

Q. Is that the reason or that he did not wear glasses?

A. He did not wear no glasses.

Q. He did not wear glasses?

A. That's right.

Q. Do you know what color his eyes were?

A. Do I go looking at the color of his eyes when he has a gun in you?

Q. I don't know.

A. Well, I don't. I don't ask questions.

Q. You were not excited at the time he came in. You said you didn't pay him any attention?

A. At first I wasn't, no, but when he pushed me over on the side to stand up against the wall I knew he meant business.

Q. Were you nervous?

A. At the time, after, sure I was nervous, I was plenty.

Q. Not when he came in with the gun and said, "This [fol. 67] is a stick-up."

A. When he first come in I was at the bar watching the ball game. I didn't get excited at first, no, because I thought the man was kidding.

Q. Was it a big gun or a little gun?

A. It was a small gun.

Q. What color was it?

A. Offhand I couldn't say.

Q. Didn't you say that you saw a man coming in the other door with a Luger?

A. That's right.

Q. You know something about guns, don't you?

A. Yes, I could tell a German Luger.

Q. Could you tell any other kind of guns?

A. I would say it was around a 32.

Q. What color would you say it was, black or white?

A. It looked like a silver job.

Q. It looked like a silver job?

A. I wouldn't swear on that now.

Q. How did he hold the gun, low or high or was he coming this way?

A. Waist high.

Q. Waist high?

A. Yes.

Q. Was he nervous?

A. He was very nervous.

Q. Did he talk in a loud voice?

A. He had a slow, rough voice.

Q. Rough voice?

A. Yes.

Q. You say he hit you. Did I understand that correctly?

A. He grabbed me from the chair and pushed me on the [fol. 68] side and told me to go stand against the wall, which I did.

Q. Did he push you hard?

A. No, he just grabbed me from the chair and pushed me on the side and told me to go stand against the wall.

Q. Was his grab a firm one?

A. No, it wasn't.

Q. You were sitting facing the television.

A. That's right.

Q. Could you use this same drawing?

A. No, I can't.

Q. Where was the television with reference to the room itself? I think you said this is the entrance.

Mr. Cummins: Is that right, Mr. Eisenstein?

Mr. Eisenstein: I think that is what he said.

Q. With reference to that entrance and this is supposed to be Bergen Boulevard and the bar is supposed to be here, could you tell us where the television was?

A. I'm sorry I can't follow that diagram there.

Q. Could you make a new one?

A. My own way, yes, the way I was sitting. I will put it there.

Q. Will you go down and make that diagram.

A. Yes. This is the door here. The bar was like this. That's the bar and there is a door back to the kitchen here and then this was a dining room and they had an entrance there and the television was in this corner and I was sitting right at the end of the bar there. This was the Boulevard. [fol. 69] That is the parking lot.

Q. Mark the Boulevard "BB" for Bergen Boulevard and "PL" is for parking lot.

A. Yes. That is the television there. That is the best I can remember that place.

Q. This is the entrance?

A. No. That is an entrance to the kitchen there. There is a kitchen right there.

Q. Can we mark that "KE" for kitchen entrance? Is that all right?

A. All right.

Q. Which is the other entrance?

A. This is the entrance off the Boulevard. This is no good here. This is the entrance right there for the Boulevard.

Q. Shall we mark that entrance?

A. Yes.

Q. This is the television?

A. Yes.

Q. Put a little "t" there.

A. I have. This is off. This is the bar comes like this to the best of my knowledge—wait a minute—no, I'm sorry. Can I have have another sheet, please?

The way the building is situated it is different.

Q. Now, you have changed the bar over this way. Your bar did not go parallel with Bergen Boulevard as you first had it.

A. No.

Q. You were not sitting facing this way toward the television as you showed it there before.

A. Look, I can't draw the room perfect. I was sitting [fol. 70] right there and from there you could watch the television.

Q. How many windows were there, if you know?

A. I know there was a couple on this side, a couple there and a couple there.

Q. They were ordinary home windows, not big plate glass windows?

A. I don't know. I didn't count them. They were ordinary windows.

Q. That is what I mean?

A. Yes, an ordinary window.

Q. Similar to what is in a home as opposed to plate glass windows?

A. About two, six by four something.

Q. Exactly how long is this, roughly, would it be about 50 feet?

A. No, it isn't that.

Q. Or 10 feet? It would be 20 feet?

A. About 18 feet.

Q. About 18 feet from here to here?

A. 18 or 20.

Q. The television itself, was it on the floor, a floor model or one of those on a stand?

A. No.

Q. Or up in the corner?

A. It was on a table.

Q. Was it on a table?

A. Yes.

Q. It wasn't up on a shelf?

A. No.

Q. Go back on the stand now, please. Do you know whether the shades were drawn for the television?

A. I didn't notice.

Q. Was it very light, with the sun shining?

A. As far as I know it was light, yes, it was light.

[fol. 71] Q. Would the sun be shining through those windows?

A. Well, not at that——

Q. What I am trying to get at is had the room been slightly darkened to help out the view of the television?

A. Gee, I don't know if they had shades in the place. I couldn't really tell you if they had shades on the place.

Q. You had been there how long before the stick-up?

A. About ten minutes, fifteen minutes the most.

Q. You sat on a stool, I presume. You said a stool.

A. A stool, yes.

Q. Nearest the door?

A. Yes.

Q. So this was the bar and I presume the bartender's domain is back here and he would stand here and serve the beer to you?

A. Yes.

Q. You had your beer. Had you drunk all?

A. I already had one beer. When I went into the place I ordered a glass of beer, went in the men's room and came back and finished it. Then I ordered another drink of beer.

Q. Were you drinking that then?

A. I was drinking that then and watching television.

Q. I want to ask you one more question on the location. You were at the corner.

A. Yes.

Q. If this side of the bar were to be extended in a straight line toward Bergen Boulevard where would it hit with [fol. 72] reference to the door?

A. About even.

Q. Even with which side, this side here?

A. That side there. That would be about parallel with the door.

Q. This if extended straight would hit right there?

A. Yes.

Q. How wide was this space between the door entrance and this bar?

A. There ain't much space.

Q. There was room for a man and a chair?

A. Oh, yes.

Q. There was room for a man to walk in. Could you estimate how wide that would be in feet or distance by pointing it out?

A. About four feet.

Q. There was no entrance behind the bar from this side?

A. I didn't notice.
Q. Were any other people sitting up on this side?
A. I think there was a fellow sitting on the front part.
Q. All on this part?
A. Yes.
Q. This we refer to as the front.
A. Yes.
Q. How many were sitting there?
A. Gee, I don't know offhand.
Q. Were there many or a few?
A. There were quite a few fellows in there, must have been seven or eight.
Q. Did somebody earlier say 14?
A. I don't know.

Mr. Eisenstein: I object to what somebody earlier said.
[fol. 73] The Court: I will sustain the objection.
Mr. Cummins: I withdraw it.

Q. How many people would—say approximately were sitting at this part of the bar?
A. Gee, I don't know.
Q. About how many? Was it five or ten?
A. I would say about seven. I can't tell.
Q. This man that you said seemed to be Hoag when you first came in was sitting where with reference to the bar?
A. Down the end.
Q. Down here?
A. Yes.
Q. Which entrance did he go out?
A. The front entrance.
Q. In other words, he walked right by you?
A. Yes.
Q. And out that entrance?
A. Yes.
Q. How long after he left did the hold-up take place?
A. Oh, I don't know, about five or seven minutes, I don't know.
Q. About five or seven minutes?
A. Somewhere around there.
Q. At that time you were facing this television and you estimated the size of the room to be 18 or 20 feet?
A. I'm not positive.

Q. You did say you were not positive but you say approximately 18 or 20. Is that right?

A. Yes.

[fol. 74] Q. You were facing toward that television down this corner and he walked right past you while you were sitting on the stool. Was it a high stool or a low stool?

A. It is a high stool.

Q. If this distance from the bar itself was about four feet he would have had to come right very close to you, as close as I am now, wouldn't he?

A. Yes, to get out, sure.

Q. This man did, didn't he?

A. In order to go out the front door he had to.

Q. Did he?

A. Yes.

Q. Did he?

A. Yes.

Q. He did.

A. Yes.

Q. At that particular time did you get a good view of him?

A. I didn't pay attention to him.

Q. How many other men left while you were there?

A. I didn't notice anybody else leave.

Q. You didn't notice anybody else leave?

A. No.

Q. How many other people came while you were there or before the stick-up?

A. While the stick-up was on I don't know, lying on the floor.

Q. Before that. From the time you first came to the time you were brought to the back room how many people came in?

A. I don't get what you mean. I just answered.

Q. You came in, went to the men's room, came back [fol. 75] and had your beer. From that particular time until the time of the stick-up when this tall man said to you, "This is a stick-up", had any other people come in?

A. As far as I know I didn't notice anybody.

Q. You didn't notice anybody?

A. No.

Q. So there was still about the same seven people?

A. I imagine so, yes.
Q. Tell us yes or no.
A. I would say there was at least seven people in the bar.
Q. At least seven?
A. Yes.
Q. You said the man did not wear glasses?
A. No.
Q. Did he wear a hat?
A. Yes.
Q. What color hat?
A. Brown, I believe, brown hat, felt hat.
Q. You believe it was a brown felt?
A. Yes, a brown hat, a brown felt hat.
Q. Did he have any gloves?
A. I didn't see any gloves on his hands.
Q. But you saw a small automatic pistol as you called it, did you?
A. I don't know if it is or not.
Q. It was a small pistol?
A. It was a small gun, yes.
Q. The man came that close right at that point but you didn't see whether he had gloves, but you saw it was a small gun that you think it might be silver?
[fol. 76] A. Yes.
Q. It wasn't black?
A. No.
Q. Was it grasped firmly?
A. It comes back to me now he was right-handed.
Q. He was right-handed?
A. Yes.
Q. Why do you say that?
A. Because of the way he held it in his hand there with the way I would look at it.
Q. Not the way you would look at it.
A. All right.
Q. Will you try to tell us definitely and if if you don't know say, "I don't know"? It is awfully important. You are under oath.
A. I don't know definitely.
Q. You don't know whether he had the gun in the right hand or left hand as he came in?

A. I don't know definitely, that's right.

Q. Did he have a shave or did he need a shave?

A. He needed a shave, sir.

Q. Badly?

A. He had a beard.

Q. He had a beard?

A. Yes. If I left my face go in the day I need a shave in the night and I got a big beard.

Q. We all shave.

A. Yes.

Q. Did he need a shave very badly?

A. I didn't take that notice. I don't go take that much notice on a guy's face. I didn't take that much notice. I noticed the man had a beard and that's what he had, a beard.

[fol. 77] Q. Was it a heavy beard indicating several days' growth?

A. I didn't take that much notice.

Q. Was his face thin?

A. No, I wouldn't call it thin.

Q. Never mind looking over there.

A. I'm not looking at him.

Q. Was his face long? Was there anything prominent about his face?

A. I didn't notice.

Q. Did he have a prominent Adam's apple as many people have?

A. Look, as I said before, I don't go around looking at a guy real——

Q. You were held up there with a gun.

A. That's right, I was held up with a gun.

Q. The fellow was very close to you. You saw he had a heavy beard.

A. Yes.

Q. You are not prepared to tell us how heavy and you don't know whether he had the gun in his right or left hand. Is that right?

Mr. Eisenstein: This is summation in this question.

The Court: Objection sustained.

Q. Did he wear gloves?

A. I didn't see no gloves. He didn't have no gloves.

Mr. Eisenstein: I object. He answered and it is repetitious.

[fol. 78] The Court: Objection overruled.

Q. Had you had anything else to drink that day?

A. No, I didn't have no drink that day.

Q. That was the first beer and you were on the second?

A. That was the first. The only reason I stopped in that place that day is I had to go to the men's room.

Q. Then having gone there you were not going to sell shoes, you were there to have a beer and watch television?

A. I had no intention of selling shoes.

Q. Had you been listening to the game on your radio coming down?

A. I don't remember if I had by radio on in the car.

Q. Do you remember who was playing that day?

A. No, I don't.

Q. You don't remember anything about the game itself?

A. No, I don't.

Q. Or where it was held?

A. No.

Q. Could you describe the television set, whether it was large or small?

A. All I know it was a table model set, it sat on a table.

Q. Were any of the lights lighted in the room?

A. I didn't notice any lights at all.

Q. Would you say there weren't any lights on?

A. It was a beautiful day outside.

Q. But you wouldn't say that there were any lights?

[fol. 79] A. There were no lights on.

Q. You don't know whether the shades had been covered a bit or not?

A. As I said before I didn't notice if there was any shades on the window.

Q. As you sat right here you would have to look right down through this window. Right?

A. Yes.

Q. In other words, do you know whether any shades, curtains or signs or anything obstructed that view?

A. I didn't notice anything. I didn't pay that much attention to the windows.

Q. Were any of the lights, Krueger's beer or the neon lights on the windows?

A. I don't remember.

Q. Have you ever been to that place since?

A. Yes I have, many a time.

Q. Many a time?

A. Yes.

Q. Have you been there since the fire or before the fire?

A. Before the fire?

Q. Yes.

A. I stopped in that place before the fire. I happened to go by just the day I was going to the city.

Q. Was it each time to go to the men's room?

A. No.

Q. To sell shoes?

A. I used to stop in there. If anybody needed a pair of shoes I would sell them a pair of shoes, yes.

[fol. 80] Q. You would bring your shoe bag out of your car?

A. It is a shoe kit.

Q. The shoe kit each time you went in?

A. Yes.

Q. You stopped there many times?

A. I wouldn't say that but I stopped in there after the hold-up. I stopped in there.

Q. Had you ever been there before?

A. No, that's the first time.

Q. But you stopped in there after?

A. Yes.

Q. And you don't know, you are not quite sure of the location of the bar or any of the windows?

A. I don't pay no attention to the windows.

Q. Where is the other door now that we talked about?

A. Where?

Q. You told us about the front door. I am sorry, Mr. Yager, I am just trying to get this information.

A. I know, sir.

Q. I am trying to do a job. Please. You said there was a front door. Is that correct?

A. That's right.

Q. Now you said there was one other door.

A. Correct.

Q. That's right?
A. Yes.
Q. I think you said it is in the dining room.
A. Correct.
Q. Is this the other door?
A. That is correct.
Q. Is there what we used to call the old-fashioned storm
[fol. 81] door around it with three walls?
A. I believe there is three walls there.
Q. There is?
A. Yes.
Q. So I am right and do we put this across here as to the wall?
A. Those marks I made they just indicated a door.
Q. Was the door in through here or through here or through here?
A. The door opened out.
Q. Out toward the parking lot?
A. That's right.
Q. So would you say the door was here?
A. There was nothing there. It was just a shelter.
Q. Was there a door on it?
A. I didn't notice any door on there at the time.
Q. As a matter of fact, this was a double door three feet in. In other words, what you call those are old-fashioned storm doors we used to put up. There were three sides outside the other one?
A. Yes.
Q. In other words, if this were extended this way and this were extended this way that would be the way it is?
A. On the far side there was an extension coming out toward the parking lot, there was another extension coming out and toward the entrance it was just open.
Q. Was there a door on each side?
A. No.
Q. Was this just open?
A. That was closed there.
Q. So that should be a solid line?
[fol. 82] A. That's right.
Q. What about this side?
A. That was closed.
Q. How about this side?

A. That's where the door was going into the dining room.

Q. Into the dining room?

A. Yes.

Q. You came into this and you had to turn left and through another door. I'm sorry if I annoy you but it is awfully important.

A. Right here was plain. That was plain. This was open, no door there and right here was your door going to the dining room.

Q. Where was the telephone you saw ripped out?

A. It was against the wall in here.

Q. Was it a booth or was it like loose?

A. It was a booth.

Q. Now, Mr. Yager, I think you said you saw a man coming in this door?

A. Yes.

Q. With a German Luger.

A. Look, that diagram is not perfect. I'm not an architect.

Q. That's right, but it is substantially correct, isn't it?

A. The way it stands there that little door from the dining room into the tavern is just an entrance right from the wall, the outside wall.

Q. Mr. Yager, you were there that day, weren't you?

A. Yes.

Q. You were sitting right here?

A. Yes.

[fol. 83] Q. You said you saw a man come in from the dining ro. n, from the other entrance I think you said.

A. The other entrance.

Q. Would that be in through the dining room when you referred to it? I don't want to deceive you.

A. This is the one here. That wall comes down like that and this side there was no door, just an opening. It is quite a wide opening. That door might be closer to here. I'm not saying how close it was to the opening.

Q. Where was the man you saw with the German Luger?

A. When I seen the man with the German Luger he was guarding this door, the entrance.

Q. As a matter of fact didn't you first draw it correctly

when you put the door right here and you were sitting over there it would be impossible to see?

A. You can't see from there to there.

Q. Not with the partitions you had at first?

A. I'm not an architect, Counsellor.

Q. This man is on trial for something serious. Tell us.

A. There is an opening. You could see from that entrance out to that entrance.

Q. You could see the German Luger there?

A. That's right.

Q. Mr. Yager, you have been there many times before the fire?

A. Before the fire.

[fol. 84] Q. Yes.

A. And I haven't been in it since.

Q. Those many times were after the hold-up.

A. Yes.

Q. Do you still swear that there was no partition running from this door to this wall?

A. All I know is——

Q. Wait a minute. Please answer the question, Mr. Yager.

Mr. Eisenstein: Give him an opportunity to answer it.

A. From where I was standing right there by the door where I was put against the wall there was a man at that side entrance with a German Luger in his hands guarding that door and you could see.

Q. That is where you placed him, right here?

A. I might have that door back farther. It might be closer than that.

Q. The door is the other side of this general partition. Is that right?

A. Yes.

Q. Your bar is separated from your dining room and from your kitchen by partitions, right?

A. Yes, there is an entrance behind the bar too.

Q. Your telephone is in back of the partition?

A. That's right.

Q. When you go out this door here you go around about this door. Is that right?

A. There is an entrance to the parking lot.

[fol. 85] Q. You still say you could see this man behind that entrance while you were sitting there?

A. You could see from that end of the bar out to the entrance of that door anybody coming in that door.

Q. Mr. Yager, you have placed this man away from the door, haven't you?

A. I haven't placed him away.

Q. Didn't you say that?

A. I said the door might be even that closer to the partition.

Q. This is solid here and here, isn't it?

The Court: We will recess now for one hour for lunch.

(Recess 1 to 2 p. m.)

(After recess)

Q. Now, Mr. Yager, would you tell us the distance from the jamb of this door that is nearest to the wall which we call the parking lot side? How far is that approximately? Could you describe it in distance from myself to you?

A. I wouldn't call it a door, it is more like an arch.

Q. There is a door, isn't there, Mr. Yager?

A. I couldn't recall it if it is a door there or not.

Q. It is a door about as wide as that door or a little narrower?

Mr. Eisenstein: I object.

The Court: I will sustain the objection.

Q. You would say it was an arch?

[fol. 86] A. I would say it was more of an arch.

Q. Having no door on it?

A. There was no door. It wasn't closed when I was in there.

Q. Is there a door that swings that you could close?

A. I don't know.

Q. Assuming that this is the side of the arch or doorway how far would that be from the wall? Do you understand my question?

A. Yes, I know what you mean. It is a good size. Offhand I couldn't give you the estimate of the size of what it is.

Q. Could it be four or five or six feet?

A. Four feet.
Q. Four feet?
A. I mean just a guess.
Q. Just purely a guess?
A. Yes.
Q. Now, how far is this doorway from the point where the Bergen Boluevard wall would be intersected by this division line?
A. How far the doorway is from that partition there?
Q. Yes, sir, from here to here?
A. I couldn't say.
Q. Was it far?
A. It was pretty close.
Q. In other words, this is closer to here than it is to here?
A. I don't know.
Q. In other words, it is pretty close?
A. That's right, it is close to the partition there.
Q. Is there a door on this?
A. Yes.
[fol. 87] Q. Was that open or closed on the particular day?
A. That was closed.
Q. Was there a screen door on it?
A. I couldn't say.
Q. How far out do these partitions extend?
A. I don't know.
Q. I'm sorry, this partition I mean.
A. I really couldn't say how far.
Q. Would you say four feet?
A. It might be.
Q. You saw that this man had a Luger from this, sitting here?
A. That's right.
Q. This is the dining room.
A. Yes.
Q. How big is this dining room?
A. I haven't got no idea.
Q. Is it bigger than this?
A. Oh, yes.
Q. Many times bigger?
A. Yes, it is a nice large size.

Q. A large size?
A. Yes.
Q. You referred to this as small?
A. Yes.
Q. Would you say this is at least twice as big?
A. Easy.
Q. Would you say five times as big?
A. No.
Q. Three times as big?
A. Maybe two and a half.
Q. Is this dark or light?
A. I couldn't say offhand with the decorations they got there.
[fol. 88] Q. There were all tables in here?
A. Yes.
Q. There was no one at those tables?
A. No.
Q. How many tables would you say were in there?
A. I don't know.
Q. How many? Two dozen; eight dozen?
A. I haven't the slightest idea. I didn't count them.
Q. 50 dozen?
A. No, there wasn't that many.
Q. How many windows?
A. There is windows but I couln't say exactly how many windows there were.
Q. Were they shaded?
A. I don't happen to recall that day if they were shaded or not.
Q. Were there any venetian blinds?
A. I don't know.
Q. Would you say it was darker in this room than this room?
A. No. I would say about the average as the other room.
Q. Now, the man that stood here, was he tall?
A. No, he was an elderly gentleman.
Q. Elderly?
A. I wouldn't say elderly. I would say in his 40's.
Q. Was he tall or short, the man here?
A. About 5 feet, 9.
Q. Was he heavy set or slight?

A. No, he was on the average, about 180 pounds.

Q. You are not describing me, are you?

A. No.

Q. Did he wear a hat or was he bald-headed?

A. Well, he wore a hat and as far as I could see he had [fol. 89] real black hair.

Q. Black hair?

A. Yes.

Q. How did you tell that?

A. On the sides.

Q. From the sides?

A. Yes.

Q. He wasn't gray?

A. No.

Q. The other man you said you saw him there, where was he stationed?

A. I really couldn't tell you. I didn't see him that much. I don't know nothing about the other man.

Q. Did he carry a gun?

A. I really couldn't say.

Q. Did this man give any orders?

A. I really don't know. I really couldn't tell you. My face was to the floor.

Q. Who followed you in there? It might have been any one of them?

A. It might have been any one of them, that's right.

Q. Were you taken in one at a time?

A. No, we were all together. We were all pushed in there.

Q. Did anybody come around *ths* door or is there a door, I am sorry?

A. There is an opening there into the dining room.

Q. Did anybody come around there?

A. I didn't see everything going on. I couldn't tell.

Q. You were stationed right here when this man you [fol. 90] describe as Hoag, the defendant, came in, passed you that distance of four feet. How close were you to the bar?

A. I was sitting right there. My elbows were resting on the bar.

Q. He walked past you. Did he take you with him?

A. No, he didn't walk by me. He stood right ther next to me.

Q. Next to you?

A. Yes.

Q. Who went behind the bar and took the money out

A. Some other fellow did.

Q. Did you see him do it?

A. Yes, only one guy going back. I didn't notice whic it was.

Q. Were you still at the bar when that man did that

A. No, I was standing up.

Q. Facing which way?

A. At that time when one guy went behind the bar was just going toward the wall.

Q. You can't describe any of the other?

A. No, I can't.

Q. Did any of them wear moustaches?

A. I really couldn't say.

Q. Or sideburns?

A. I really couldn't say.

Q. Or full Van Dyke beards?

A. I really couldn't say.

Q. What was their complexion?

A. I didn't take notice too much about them.

[fol. 91] Q. Referring specifically to the man who cam in this door did he have a sallow look or rosy of a ta look on his face?

A. I really don't know.

Q. You say he wasn't thin faced?

A. He had a medium face.

Q. A medium face?

A. Yes.

Q. Would you describe mine as medium?

A. No, yours is a little chubby.

Q. Mine is a little chubby?

A. Yes.

Q. Did he have any scars?

A. I never noticed them.

Q. You did see his face?

A. Oh, yes, I saw his face.

Q. If he had a scar from here to here would you hav noticed that?

A. Oh, yes, that would be noticeable.
Q. Would you say he had no scars?
A. As far as his face I didn't recognize any scars. I didn't look for any.
Q. Were his eyes bloodshot?
A. I never looked at his eyes.
Q. You don't know their color?
A. I didn't pay that much attention to his eyes.
Q. Were they closed, half closed, or wide open?
A. How the heck could they be closed?
Q. It was a bright sunny day out?
A. Yes.
Q. Were they half closed as though someone was coming in out of the sun?
A. I didn't pay that much attention.
[fol. 92] Q. He had no glasses on?
A. No.
Q. Was there anything unusual about his face?
A. No.
Q. Could you tell what the color of his hair was under the hat?
A. The sideburns.
Q. Did he have a brown felt hat?
A. As far as I could make out his hat was dark brown.
Q. His hat was what?
A. Brown.
Q. How did he wear it, down over the eyes or pulled right up?
A. No, as any man would wear his hat.
Q. There was no pulling down over the eyes?
A. No.
Q. No masks whatsoever?
A. No masks whatsoever.
Q. The only words that were said were "This is a stick-up."
A. That is what he told me.
Q. How did his clothes fit? Were they well-fitting?
A. They weren't baggy.
Q. They were not baggy?
A. No.
Q. You don't know the color of the trousers?
A. No.

Q. You think he had a brown coat?
A. He had a zipper-lined jacket.
Q. He had a zipper-lined jacket?
A. Yes.
Q. What color tie did he have, if any?
A. I don't know.
Q. Did he have a tie on?
A. I didn't pay that much attention to it.
Q. What part of him would you have seen as you turned [fol. 93] away from the television toward him coming in, from the belt up?
A. I could see him, the whole body, the whole view of him but I don't remember what color pants he had.
Q. He was as close as I am to you?
A. Sure, he was.
Q. But you didn't notice anything in particular about his tie?
A. I didn't take that muct notice to him.
Q. Whether he had a tie.
A. When a guy sticks a gun in your belly you don't go look to see what kind of stuff he has on.
Q. Do you know whether he had jewelry or rings on?
A. I don't know.
Q. Did he have a holster for the gun?
A. I really couldn't tell you.
Q. Did he carry any bundles with him?
A. Bundles?
Q. Yes, or packages.
A. I didn't see any.
Q. He didn't have any then?
A. No, I didn't see any bundles.
Q. You don't know which hand he had the gun in?
A. As I said this morning I wasn't sure which hand he had his gun in.
Q. Were any fingers missing from either hand?
A. I didn't notice that.
Q. How close to you did he put the gun?
A. A couple of inches.
[fol. 94] Q. A couple of inches?
A. Yes.
Q. Could you see it?
A. Sure.

Q. You saw his hands on it?
A. Yes.
Q. Now, they first stood you up against the wall?
A. Yes.
Q. Which wall is that that they stood you up against?
A. Toward the television set.
Q. The one facing the television, or Bergen Boulevard?
A. That's where I was standing up against.
Q. They put you up against this wall?
A. That's right.
Q. They put you all to this wall?
A. I don't know the other ones. I didn't pay that much attention to it.
Q. You said others were lined up there?
A. That's true, everybody that was in the bar.
Q. They lined you all up against that wall?
A. And they searched me.
Q. Against this wall?
A. That's right.
Q. There were two windows there?
A. I really don't know. You asked me this morning. There could be windows there, and that's the best of my ability.
Q. Are there any windows?
A. There is. There is a window there.
Q. I don't want to put anything that isn't there.
A. There is a window there.
[fol. 95] Q. Is there more than one window?
A. If my theory is right there is one double window there.
Q. When they lined you up against the wall were you facing against the wall?
A. Yes.
Q. How many were lined up against this wall?
A. I didn't count it.
Q. You said there were about seven or eight there?
A. Yes.
Q. Were all the people who were there lined up against it?
A. Well, no. Offhand I know there was a couple of guys standing right next to me.
Q. Were you hands up facing the wall?

A. That's right.

Q. Were any of you directly in front of the windows?

A. Yes.

Q. You don't know whether there were any curtains or not on the windows?

A. I didn't pay that much attention to it.

Q. Bergen Boulevard is a public street.

A. That's right. It is a very busy boulevard.

Q. You were lined up against the windows apparently without any curtains on.

Mr. Eisenstein: I object to that.

Mr. Cummins: That is important. I am trying to find out.

[fol. 96] The Court: Ask him were there any curtains there.

A. I don't remember.

Q. Were there any shades there?

A. I don't know.

Q. Were there any venetian blinds there?

A. I don't know.

Q. But you do know these people were lined up against those windows with their hands up?

A. That's correct.

Q. These windows face Bergen Boulevard which joins the George Washington Bridge and Hudson County boulevard?

A. Yes.

Q. How far is this from the street?

A. I don't know. I never measured it.

Mr. Cummins: No further questions.

By Mr. Eisenstein:

Q. Mr. Yager, light or dark, shades or no shades, Bergen Boulevard or parking lot, are you positive upon your oath that William Hoag is the man who stuck the gun in your ribs on that day?

A. I am.

Mr. Eisenstein: I have no further questions. Step down.

[fol. 97] Mr. Eisenstein: State rests, your Honor.

Mr. Cummins: At this time I move to dismiss——

Mr. Eisenstein: If there is going to be a motion it should be made without the presence of the jury.

The Court: If it is a motion to dismiss I am going to deny it. I will assume you are going to argue there is no evidence or insufficient evidence, or something of the sort.

DISMISSAL OF "CONCEALED WEAPONS" COUNT IN THE THREE INDICTMENTS

Mr. Cummins: Among other things, your Honor, there is one count in there of carrying concealed weapons.

Mr. Eisenstein: State asks that that count be dismissed.

The Court: I will dismiss the count as to carrying concealed weapons in each indictment.

Mr. Cummins: On the other you deny my motion for dismissal?

The Court: I deny the motion as to the charge of armed robbery.

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WILLIAM JAMES HOAG sworn.

Direct Examination

by Mr. Cummins:

Q. Mr. Hoag, how old are you?

A. I was 27 a couple of weeks ago, last month.

A. Are you married or single?

A. Married.

Q. Have you any children?

[fol. 98] A. Yes, I have an infant daughter.

Q. One daughter, how old?

A. About a year and three months.

Q. Were you ever convicted of any crime?

Mr. Eisenstein: I object to it, if your Honor please.

The Court: What is the relevancy?

Mr. Cummins: I just want to show it to the jury.

The Witness: Mr. Cummins, may I tell the whole story my own way?

The Court: No, don't answer. I will sustain the objection.

Q. In September of 1950 where were you working?
A. I was working in Cudahy's Meat Packing Company.
Q. I beg your pardon?
A. Cudahy Meat Packing Company.
Q. Do you know how long you were working there?
A. Yes, about five months.
Q. What work were you doing there?
A. I was loading meat trucks in the night time, on the night shift.
Q. How long were you working there?
A. Mr. Cummins, may I tell this story in my own words? I get all confused like this. I mean I am up, as far as being here, for mistaken identity.

[fol. 99] Mr. Eisenstein: I move that be stricken.
The Court: Strike it out.
Mr. Hoag, Mr. Cummins will put the questions to you and you will answer them. You are here on the stand as a witness.
The Witness: Can I tell the story in my own words?
The Court: No. You have no right to volunteer.
The Witness: I would like to tell everything beneficial to me or not, because that's the only way the jury can learn it.
The Court: Look, do you want to have trouble with me?
The Witness: I want a fair trial, your Honor.
Mr. Cummins: Listen to me.

By Mr. Cummins:

Q. When were you married?
A. I was married May 22, 1947.
Q. Did you have any service record?

Mr. Eisenstein: I object to that, if your Honor please.
The Court: Objection sustained.
Mr. Cummins: I think that is perfectly proper.
The Court: Unfortunately for you I am here to make rulings and I don't see the relevancy of it. If this is an [fol. 100] attempt to gain sympathy of the jury——

Mr. Cummins: I am not attempting to gain any sympathy from the jury.

The Court: If it is an attempt to gain sympathy from the jury it is not admissible. If it isn't then what purpose does it serve?

The Witness: Your Honor, may I talk to the guard, please?

The Court: No, you may not.

Q. Now, you were working for Cudahy Meat Packing Company in September of 1950.

A. Yes, that's right, Mr. Cummins.

Q. How yong did you work there?

A. I worked there for about five months.

Q. When did you leave or were you let go?

A. I think it was in September, late September or early September, I forget.

Q. Calling your attention specifically to September 20, 1950, where were you living at that time?

A. At that time I was living on 69 West 71st Street in Manhattan, New York.

Q. Who was living there with you?

A. My wife and myself.

Q. Were you working on September 20, 1950?

A. No, I don't believe I was, Mr. Cummins.

[fol. 101] Q. Do you remember where you were September 20, 1950?

A. Yes, I do. I can recall every day.

Q. All right, tell us where you were that day?

A. On that day on September 20—you said it was on a Wednesday when we discussed the case. It was on a Wednesday. I was over to my mother-in-law's house. I can't tell this story unless I tell it in my own words without anybody interrupting me.

The Court: You are not going to be permitted to do that.

The Witness: Your Honor, surely I am entitled to my rights for mistaken identity.

The Court: I am here to protect your rights.

The Witness: It isn't protecting my rights if you don't let me tell the story myself.

The Court: You are going to be in contempt of Court if you insist on volunteering information while you are on the witness-stand. I warned you before. I warn you now for the second time you are not permitted to do it. Simply answer the questions put to you.

Q. On September 20, 1950 do you remember where your mother-in-law lived?

A: My mother-in-law lived on West 48th Street, 428

[fol. 102] Q. 428?

A. Yes, sir.

Q. What is her name?

A. Mrs. May Gallagher.

Q. Do you know what time of the day you went there

A. Yes, I remember it distinctly, my wife and myself early in the morning. How could I forget? There was something happened that day I couldn't forget.

Q. What time did you get there? Were you there all the time?

A. I remember we left my place it must have been about early in the morning, it was either 10 or after 10 o'clock in the morning. We went to my mother-in-law's house, it must have been before 12 o'clock, or a few minutes after. I remember she asked us would we have a cup of tea or lunch.

"No," I said, "I grabbed a bite out of the ice box before I come."

Q. What did you do?

A. There was a few bottles—I remember my brother in-law Albert——

Mr. Eisenstein: I move that that be stricken: There is no question pending.

The Court: Shop right here.

Q. What did you do when you first came to the house

A. What?

Q. What did you do when you first came to the house of May Gallagher on September 20 which I think you said was before noon?

A. In the morning, it was before noon, that's right.

[fol. 103] Q. Did you stay for dinner there?

A. Yes, we stayed all day long.

Q. Did you go out at any time?
A. Yes, I did go out a few times.
Q. What did you go out for and where?
A. I went down to a friend of mine down the block, me and my brother-in-law. There were a couple of bottles of beer in the ice box from the night before. So me and my brother-in-law we finished those two off. So then I went down to see a friend of mine to borrow some money. He works in a milk company on 12th Avenue and 48th Street. I went down and asked him did he have any money.

Mr. Eisenstein: I object to any conversation with a friend of his.
The Court: Objection sustained.
By the Court:

Q. One simple question will cover it pretty nearly. Where were you at 3:30 p.m.?
A. At 3:30 p.m.? What is the date?
Q. September 20.
A. I was in my mother-in-law's house because I can recall every day.

By Mr. Cummins:

Q. On September 20th, at that time, you were in your mother-in-law's home?
A. Yes, that's right, definitely.
[fol. 104] Q. Was your wife present?
A. My wife was present, certainly.
Q. How long had you been there before 3:30?
A. I was there all day.
Q. How long after 3:30 were you there?
A. We left for Woodside about 7 o'clock in the evening.
Q. Woodside, Long Island?
A. Yes, Long Island.
Q. Long Island?
A. Long Island.
Q. Did your wife go along with you?
A. Yes, my wife, my brother-in-law, my sister.
Q. And at 3:30 you were there?
A. Yes.

Q. Tell us whether you had anything to eat or drink at that time?

A. We had a bite to eat for supper at my mother-in-law's house before we left.

Q. You stayed there until about 7 o'clock?

A. Yes, that's when my wife's brother-in-law came in.

Q. Were you ever in Fairview, New Jersey?

A. I will be honest with you, Mr. Cummins, the Judge, the Court, and everybody——

The Court: Don't make a speech. Answer yes or no.

A. —I don't know where Fairview is. No, I was never in it.

Q. Never in Fairview?

A. I don't even know where it is.

[fol. 105] Q. You were born and brought up where?

Mr. Eisenstein: I object to that.

Mr. Cummins: I think it is perfectly relevant your Honor.

The Court: I don't think so. I will sustain the objection.

Q. When were you born?

Mr. Eisenstein: I object to that.

The Court: Objection sustained.

Q. Where were you born?

Mr. Eisenstein: It doesn't make any difference, if your Honor please. How can it possibly be material?

The Court: Objection sustained.

Q. You have never been in Fairview?

A. I don't know where Fairview is, Mr. Cummins. I tried to tell them that.

Q. Were you ever in a tavern known as Gay's Tavern?

A. No.

Q. On Bergen Boulevard?

A. Never.

Q. Do you know where Bergen Boulevard is?

A. I don't know where it is.

Q. Did you go in and hold-up with others this tavern on September 20?

A. No, sir, I did not.

[fol. 106] Q. Did you ever go in this tavern and push Yager over here to the corner?

A. I did not. Mr. Cummins, I don't know nothing about this.

Q. You have never been in the tavern?

A. I don't know where the tavern in Fairview is. I don't know nothing. I don't even belong in New Jersey for a trial here for something I didn't do.

Q. Do you remember seeing Yager?

A. I seen Yager once.

Q. Where?

A. The man I know now as Yager.

Q. Where did you see him?

A. It was about six months ago over in New York.

Q. In a police line-up?

A. Yes, sir.

Q. Was that the first time that you ever saw Yager?

A. First time I ever seen the man in my life.

Q. Prior to this had you ever seen Mr. Dottino or Mr. Tascio or Capezzuto?

A. I don't know the names of the four people.

Q. The men.

A. I seen the men this morning. I don't know their names but I seen those men before.

Q. Where?

A. Over in a police line-up in New York.

Q. Were they all in the line-up in New York?

A. Yes, sir, all of them. There was officers there and it's on record that they were there.

Q. Did you see Galiardo in the police line-up in New

[fol. 107] York?

A. I don't know their names. All I remember is their faces.

Q. The first one that testified.

A. Yes, I seen him, yes.

D. Did you see Dottino there?

A. I seen these men that were up here.

Q. These men here this morning?

A. Yes.

Q. You saw over in the police line-up?

A. Yes.

Q. That was after September 20, 1950?

A. It must have been about a year and a half because it was 1951, late 1951 when I seen these people in the police line-up.

Q. You had never seen them before that time?

A. Never before in my life, believe me. I tell you the truth, never.

Q. Where is your wife?

A. My wife went insane for seeing me arrested for something I didn't do. She is crazy, in the madhouse for something I didn't do.

Mr. Eisenstein: I move that be stricken. That is a question of fact for the jury to determine.

The Court: Strike it out.

Q. Have you been able to communicate with her?

A. No, sir. They wouldn't even allow me to go over and visit her. I'm here for unjustifiable circumstances, for something which I know nothing about.

Q. Did you ask to telephone over to her?

[fol. 108] Mr. Eisenstein: I object to that.

A. I have asked many times.

The Court: Just a minute. I will sustain the objection.

Mr. Cummins: No further questions.

Cross-Examination

By Mr. Eisenstein:

Q. You were married in 1947, weren't you, Mr. Hoag?

A. Yes.

Q. What were you convicted of in 1948 after you got married?

A. May I tell my story in my own words?

The Court: No.

Q. Just answer the question.

The Court: I warned you before you are facing a charge of contempt of Court if you persist in volunteering.

The Witness: It isn't fair to me, your Honor.

The Court: I will decide that.

Q. Just answer the question.

A. I was convicted of attempted robbery.

Q. What were you sentenced to on that crime?
A. I was sentenced to three and a half to seven years.
Q. In Sing Sing?
A. Yes, sir.
Q. When were you paroled?
A. I was paroled in June of 1951—1950; yes, 1950.
[fol. 109] Q. June, 1950. Is that right?
A. Yes, sir.
Q. Just three months before this robbery was committed. Isn't that correct?
A. I don't know. They say this robbery was committed in September.
Q. What date in September?
A. They said September 20 as far as I know and I tried to find out everything I can. You people know I am innocent yourself; yet you put me to trial.

The Court: Strike it out.
Mr. Eisenstein: I ask your Honor to instruct the witness to refrain from putting an act on as he is.
The Witness: I'm not putting no act on. I want facts here. I didn't do this.
The Court: I warned you enough. After this trial is over you may be brought up before me on contempt.

Q. Where were you on September 11, 1950?
A. I can't answer. I can only tell this in my own words and you people won't let me. How can I do it? You get me all mixed up.
Q. It is a perfectly simple question.
A. When was September 11? Tell me what day it was?
Q. It was nine days before September 20.
A. Nine days before September 20?

[fol. 110] Mr. Cummins: I don't think any person in this room would know where they were September 11th.
The Court: Objection overruled.

A. I got a good memory. I can remember things.
Q. Will you answer my question, please?
A. What is it?
Q. Where were you on September 11, 1950?

Mr. Cummins: May I ask what time of the day?

Q. Any time of the day.

Mr. Cummins: I submit that is not a proper question, any time of the day.

The Court: Objection overruled.

Mr. Cummins. If your Honor please, that question certainly goes far; if he knows.

A. Mr. Cummins I know where I was.

The Court: It is cross-examination.

A. I was working in Cudahy Meat Packing Company, I'm pretty sure.

Q. When were you fired?

A. I'm pretty sure. As far as I can remember, I wasn't fired.

Q. Were you fired?

A. I wasn't.

Q. Did you leave the job?

A. There was an efficiency expert coming around. There was to many workers and I was let off.

[fol. 111] Q. You were let out?

A. I was let out. I was one of the last employees taken so they let me out.

Q. You were just let out?

A. That's right.

Q. When were you let out?

A. I can't say offhand.

Q. You don't know, do you?

A. I don't know. I couldn't say. This is a long time ago.

Q. Yes, this is a long time ago.

A. I can remember a few things; I can remember.

Q. How about September 29, 1950? Where were you then?

A. September 29, 1950?

Q. Yes.

A. Will you let me tell the story in my own words, for God sakes? Give me a break. I didn't do this. I can prove my innocence. Let me tell the story in my own words and I will you things beneficial to me or not.

Q. Just answer the question. Where were you on September 29?

A. September 29?
Q. Yes. Were you working then, too?
A. No, I don't believe I was. I was laid off.
Q. Where were you?
A. I was in New York.
Q. What part of New York were you in?
A. Manhattan.
Q. Let's stop sparring. Where were you in Manhattan?
A. I'm not sparring with you.
Q. Where were you in Manhattan?
A. What? I was in Manhattan. Isn't that Manhattan?
[fol. 112] Q. Where in Manhattan?
A. In Manhattan. I was either uptown or downtown. I don't know.
Q. That takes in a lot of territory. You were either uptown or in downtown Manhattan, is that right? But on September 20 you were in your mother-in-law's house. Is that correct?
A. I can't——
Q. I beg your pardon?
A. I can tell you everything. Let me tell it in my own words, will you?
Q. Listen to my question, please. We govern ourselves under certain rules that his Honor, Judge Del Mar, rules upon.
A. May I request your Honor to let me tell my story.

The Court: No. I have already denied you permission before. It is not your privilege.

(The reporter reads the pending question).

A. Yes.
Q. You remember that distinctly, don't you, Mr. Hoag?
A. How can I forget? There were things related to it, something I can't forget.
Q. September 20 you remember absolutely when you got there and when you left?
A. I can remember from when I was out of prison. I was only out of prison a short time.
Q. You were out of prison in June?
A. Yes, I remember in June.
Q. In June. Is that right?

A. Yes.

[fol. 113] Q. Is your mother-in-law in Court?

A. What?

Q. Is your mother-in-law in Court?

A. No, my mother-in-law is not in Court.

Q. Is your brother-in-law in Court?

A. No, none of them are.

Q. Is this your picture?

A. I believe it is, yes.

Q. Look at it and tell me whether it is your picture?

A. I seen it this morning. I believe it is my picture.

Q. It is your picture, isn't it?

A. Yes.

By the Court:

Q. Did you say on direct examination that you worke for the packing company for five months?

A. I believe it was five months, your Honor, since I wa out of prison.

Q. You came out of prison in June?

A. Yes, June 15th.

Q. It couldn't have been more than three months, coul it?

A. I don't know. I believe it was four or five months.

Q. From June to September.

A. Yes, I believe so.

The Court: Proceed.

By Mr. Eisenstein:

Q. When were you paroled? Do you remember?

A. Yes, I remember that, June 15th.

Q. June 15th?

A. Yes, sir.

Q. When did you get a job?

A. I got a job two days afterward.

[fol. 114] Q. Two days afterward?

A. Yes, sir.

Q. Is that right?

A. I believe it is right.

Q. Do you know whether it is right?

A. Yes, I believe it is right, two or three days, I'm not certain, but it was a few days after.

Q. You are sure it wasn't two or three weeks after, Hoag?

A. Of course not, it wasn't. My parole officer told me "I want you to get a job right away if you can."

I said, "Yes", and I was out at 6 o'clock in the morning looking until I got this.

Q. You got one right away?

A. I walked around looking for a job. I had an application on before—it's on record—I had an application two years previous in that same packing company.

Q. Was it after you committed the attempted robbery or not?

A. After I was released from prison.

Q. When did you put the application in Cudahy's?

A. Before that?

Q. Yes.

A. It was years before that.

Q. How many years before that?

A. Two or three years.

Q. Was it before you were convicted of attempted robbery or after?

A. Before.

Q. When were you convicted of attempted robbery?

[fol. 115] A. I think it was in 1948.

Q. The early part of 1948, wasn't it?

A. Yes, I believe so.

Q. January 10, 1948?

A. Yes.

Q. Isn't that correct?

A. I forget the day. I know it was in January, I'm pretty sure.

Q. What was it you attempted to rob at that time?

Mr. Cummins: I object to that, your Honor, please, as irrevelant.

The Court: Objection sustained.

Mr. Eisenstein: As I understand the law to be, on cross-examination anything that would appear in the record of conviction may be asked.

The Court: The law is anything that should appear means properly appear on the record. This doesn't permit you

to go into the details of the crime. Date of conviction and such things as ordinarily appear on the record.

(Counsel argues).

Q. Have you ever been convicted of any other crimes, Mr. Hoag?

A. That is the only felony conviction I have.

Q. Never mind the felony. Have you ever been convicted of any other crimes?

A. When I was a juvenile I was in trouble.

The Court: We won't go into that juvenile record.

[fol. 116] Q. How old are you now?

A. 27.

Mr. Eisenstein: Will you step up to the bench, Mr. Cummins?

(Discussion at Side Bar).

By Mr. Eisenstein:

Q. Now, Mr. Hoag, you saw Yager over in New York, didn't you?

Mr. Eisenstein: Will you stand up Mr. Yager, please.

A. Yes, sir.

Q. You saw him over there a couple of times?

A. Yes, I seen him.

Q. Two or three times?

A. Yes, I seen him once and once in the Supreme Court.

Q. What?

A. I seen him once in Court and once in the line-up.

Q. You saw him once in Court and once in the line-up?

A. Yes.

Q. When you saw him in Court did you threaten him in any way?

A. I did not. I certainly did not.

Q. Did you say to Mr. Yeager, "I'll get you for this, you so and so, you son of a B"?

A. I swear to my mother I never said that.

Q. What was it you did say to him?

A. I didn't say nothing to that man. It's bad enough [fol. 117] he is making a mistake. I didn't say nothing like that. I never said anything like that.

Q. Didn't you say "I'll get even with you for this"?
A. I did not.
Q. Did you threaten him?
A. I did not. How many times do you want me to tell you? And the man knows I said nothing to him. My God Almighty, what is this?

Mr. Eisenstein: I move that be stricken.
The Court: Strike it out.
Mr. Cummins: Do you want a glass of water?
The Witness: Yes, I would. You got me upset with a bunch of lies, my God Almighty. You got me a nervous wreck you people.
Mr. Eisenstein: I don't think I have any further questions.
The Witness: Your Honor,——
The Court: No, don't say anything. Are you through with your examination?
Mr. Cummins: Yes, I am.
The Court: Step down.

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[fol. 117-a] (At this point is inserted the transcript of testimony of Elmer S. Yager recalled, which was previously furnished to the Court on October 12, 1955, and numbered on the right pages 45 to 54 inclusive).

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[fol. 118] ELMER YAGER, recalled.

Direct examination.

By Mr. Eisenstein:

Q. Mr. Yager, when you were over in New York in some extradition proceeding, whatever it was, did you see the defendant Hoag there?

Mr. Cummins: May I have stricken "On some extradition proceeding." The record will show he did not fight extradition.

Q. Were you over in New York on some court proceeding where this defendant Hoag was there?

A. That's right.
Q. Did you see him there?
A. Yes.
Q. Did you identify him there?
A. Yes.
Q. What if anything did he say to you?
A. Well, he started calling me "You S B you, I'll get you for this", and all.

Mr. Eisenstein: Cross-examine.

Cross-examination.

By Mr. Cummins:

Q. When was it, Mr. Yager?
A. The only time I seen him in the procedure of the extradition.
Q. The only time?
A. Yes. I don't know how many times it was. I know it was a couple of times that we went over there.
Q. How many times was it that he said, "You S B you, I'll get you for this?"
[fol. 119] A. Every time I seen him he started swearing at me.
Q. Mr. Yager, will you please tell me how many times that is?
A. I don't know how many times that is.
Q. Is it 58 times?
A. It is only about three times that we were there.
Q. Mr. Yager, how old are you?
A. 30.

Mr. Eisenstein: I object to it. Just a moment. This has no bearing, this cross-examination on rebuttal, if your Honor please.

(Counsel argue).

The Court: I don't think it is proper.
Mr. Cummins: I want to test his credibility.
The Court: Any question I suppose might be a test of credibility but how are you going to prove it if he gives you what his age is? How are you going to prove if it is correct or not?

Mr. Cummins: The jury can see him.

The Court: How can this be an attack upon his credibility?

Q. How many times did you see Hoag in New York?

A. I seen him in the line-up and I seen him three other times.

Q. That is four times now?

A. That's right.

Q. Is that four times about or is it a definite four times? [fol. 120] A. That is four times altogether counting the line-up.

Q. Now, when was the first time you saw him?

A. In the line-up.

Q. Where?

A. The jail house down there in New York.

Q. Were any police officers around?

A. Well, I had to go through the police office to get up to the jail.

Q. Mr. Yager, were there any police officers there?

A. Sure there were, yes.

Q. Were there many or a few?

A. Every door I went to was a police officer.

Q. Would you say there were many police officers?

A. Sure, there were.

Q. How many, about?

A. There was two that went down to the line-up with me.

Q. How many were in there beside the two in the line-up?

A. I don't know.

Q. How many were in the line-up?

A. Oh, there must have been about 12, 15.

Q. You had already seen this picture?

A. I seen that after the robbery was over.

Q. So when you went in to see him in the line-up you had seen this picture right before that too, hadn't you?

A. Not that day.

Q. You had only seen it after the robbery?

A. I seen it right after the robbbery when the detective [fol. 121] brought different pictures to me and I picked that picture out of the line-up.

Q. Have you ever seen this picture since?

A. Yes.

Q. How many times?
A. Once.
Q. Where?
A. The day in the Prosecutor's Office.
Q. Recently?

Mr. Eisenstein: I don't think it is proper cross-examination on rebuttal. He was put on for one question, that's all.

The Court: Did the defendant say to this witness what the witness says he said of him?

Mr. Cummins: I think I can test his credibility on that.

Q. Now, we have four times you saw him and not three.

The Court: Mr. Cummins, you submitted this witness to very lengthy cross-examination before. I don't think I ought to allow you to go all over it. The question is a simple one: Did the defendant makes the statements attributed to him.

Q. Now, when was that first line-up?

Mr. Eisenstein: I object to it, if your Honor please, as being improper cross-examination on rebuttal. The rebuttal was confined only to conversation at the proceeding in New York.

The Court: I will sustain the objection.

[fol. 122] Mr. Cummins: If the Court please, he testified on all these different occcasions he threatened him. I certainly have a right to go in and show the circumstances, with police officers around, to see whether any reasonable man would do any threatening.

The Court: Proceed. I will allow you full scope to your cross-examination.

Q. The first time you saw him was where? A. In the jail house, in the line-up.
Q. How many were in the line-up?
A. I said between 12 and 15.
Q. Where was he with reference to the line-up?
A. He was one of them between all those men there.
Q. In the very center?

A. I don't remember exactly what position. I don't know what position.

Q. Was he near the head of the line or the end of the line?

A. I think he was more toward the end of the line.

Q. What?

A. He was toward the end of the line.

Q. Toward the end of the line?

A. That's right.

Q. Were there tall men or short men in the line-up?

A. They were all sizes.

Mr. Eisenstein: Is this proper rebuttal? I submit my objection to this line of cross-examination is the defendant on cross-examination was asked whether or not he ever [fol. 123] threatened the State's witness at a court proceeding in New York, "what if anything did the defendant say to you" and he said, "You S B you I'll get you for this", or words to that effect. That is the entire rebuttal.

On cross-examination counsel is now going far beyond the scope of the direct.

The Court: Let me interrupt you here because I don't think that is entirely rebuttal. He also said he called him similar names on each one of the occasions he met in New York. I suppose Mr. Cummins is entitled to inquire who was present, how many people were there, what the circumstances were, and as long as he sticks to that line I will let him proceed.

Mr. Eisenstein: That answer your Honor refers to was in response to Mr. Cummins' question, not mine.

The Court: We will have the record read.

(The Reporter reads appropriate portions of the record).

The Court: All right, Mr. Cummins, in view of this I am going to limit you to the one occasion the witness testified to on direct examination.

By Mr. Cummins:

Q. When was it that you saw him in New York?

A. In the line-up.

[fol. 124] Q. No. In other words, he has asked you a cer-

tain question as to when you saw him and he threatened you by calling you an S B. When was that?

A. At the extradition hearings.

Q. Where was that?

A. The big building in New York where they hold the Courts.

Q. When was that?

A. I don't know exactly what day.

Q. Where were you September 11 or September 25?

Mr. Eisenstein: I object to that question as being improper, if your Honor please.

The Court: Objection sustained.

Q. What year was that?

A. When? About what?

Q. That you talk about on the extradition?

A. It was this year.

Q. 1952?

A. 1952.

Q. What month, January, February, March?

A. Just give me time, I'm trying to think. Say somewhere around March.

Q. About March?

A. Around March.

Q. Don't you know the man has been in jail here since January?

A. I didn't tell you what date positive it was.

Q. Just a moment, Mr. Yager.

Mr. Eisenstein: I object to the question.

The Court: The question was already answered.

Mr. Eisenstein: I move it be stricken, if your Honor [fol. 125] please.

The Court: Motion denied.

Q. It was in March, 1952, that you saw him in Court in New York?

A. I don't remember. Am I supposed to remember exactly every day we went over there four different times?

Q. Mr. Yager, if you stop making speeches I will try to be brief in my questions.

Mr. Eisenstein: I move those remarks be stricken.

The Court: It will be stricken.
Mr. Cummins: They should be, I'm sorry.

Q. Did you testify a moment ago it was in March, 1952?
A. Yes, I did say it. I wasn't sure?
Q. Well, now you weren't sure of that testimony?
A. Of that date, I wasn't sure.
Q. You were sure of the month?
A. I was just taking a guess on it because I know I was over there.

Mr. Cummins: If the Court please, may I ask that this witness just answer the question?
The Court: You asked him to guess when the date was. He made a guess.
Mr. Cummins: I didn't ask him to guess the date, your Honor.
The Court: You asked him to fix it approximately and when he does that now you go after him for apparently [fol. 126] having made a mistake.

Q. It was in March, 1952 that you identified him in the Court in New York?
A. I'm not saying what day it is.
Q. Was it this year or last year?
A. Do you mind if I just happen to go over it a little better?
Q. Just answer the question.

By the Court:

Q. You want time?
A. Time to think.

The Court: Take all the time you need.
The Witness: All right. The first time that I went over there——

By Mr. Cummins:

Q. We will limit it to this time I have been limiting it to. On the extradition.
A. I say it was the early part of the year.
Q. How early?
A. I don't remember exactly what date and what month

it was because I went there I don't know how many times.

Q. But that is only a few months ago, isn't it?

A. Yes, but I didn't write it down.

Q. But you do remember all these other things a year and a half ago in detail.

Mr. Eisenstein: This is argumentative. I object to [fol. 127] it.

Mr. Cummins: I don't think it is on cross-examination.

The Court: I think it is.

Q. Would you say that it was in the month of February?

A. I wouldn't say positively.

Q. Would you say that you ever saw him over there?

A. Pardon me?

Q. Would you say that you ever saw him in the Court there?

A. Did I ever see him over there?

Q. Yes.

A. Yes.

Q. Now, can you tell me when that was?

A. I can't give you the exact month or the exact date.

Q. Can you tell me the year?

A. One of the times was this year.

Q. When this year?

A. I can't give you the exact date.

Mr. Eisenstein: That is objectionable, if your Honor please.

The Court: It seems to me we are wasting a lot of time on a very unimportant matter.

Mr. Cummins: That's all.

Mr. Eisenstein: I have nothing else.

(James Hoag was recalled and testified).

[fol. 128] WILLIAM HOAG, recalled.

Direct Examination.

By Mr. Cummins:

Q. Mr. Hoag, how long have you been in the Bergen County jail?

Mr. Eisenstein: I obect to it, if your Honor please.
The Court: I will allow it.

A. January, this year.
Q. January of this year?
A. Yes.
Q. What day in January?
A. January 12 I think it is. I have been locked up since November 20, 1950.
Q. You have been in the Bergen County jail since January 12, 1952?
A. Yes.
Q. You have not been out of the jail other than coming out to the Court here?
A. I haven't been out of jail since November 20, 1950.

Mr. Cummins: No further questions. Cross-examine.

Cross-examination.

By Mr. Eisenstein:

Q. When was it, January 12?
A. Yes, I think so.
Q. That is when you fought extradition?
A. I waived extradition over here.
Q. Just prior to January 12 there was a hearing in New York, in the early part of January.
A. No, there was no hearing.
[fol. 129] Q. There was no hearing at all over in New York?
A. There was a Court procedure but there was no hearing.
Q. What do you mean a Court procedure?
A. I don't know. I didn't have no hearing on the case if that is what you mean. I waived extradition over here.

Q. After you decided not to fight it any more then you came over here?

A. My lawyer over there told me, "You are innocent of it."

You can't fool a jury.

Mr. Eisenstein: I move that that be stricken.
The Court: Strike it out.
Mr. Eisenstein: I have no further questions.
Mr. Cummins: That is all.
The Court: Both sides rest?
Mr. Eisenstein: Yes, your Honor.
Mr. Cummins: Yes, your Honor.

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[fol. 130] Reporter's Certificate (omitted in printing).

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[fol. 1] The Bergen County Court, Law Division

The State of New Jersey

vs.

William Hoag, Defendant

On Indictment for Armed Robbery and Carrying Concealed Weapons.

Court House, Hackensack, New Jersey, Monday, October 18, 1954

**Transcript of Testimony**

Before: Honorable Herman Vanderwart, Judge, and a Jury.

Appearances:

For the State of New Jersey, Hon. Guy W. Galissi, Bergen Co. Prosecutor; By: Hon. Morris Malech, Asst. Prosecutor.

For the Defendant, John M. Mehler, Esq., and Philip C. Geibel, Esq.

(A Jury was empanelled, accepted and sworn).

[fol. 2] ELMER S. YAGER, called as a witness on behalf of the State, being first duly sworn, testifies as follows:

Direct Examination.

By Mr. Malech:

Q. Mr. Yager, where do you live?
A. Sunset Avenue, Fort Monmouth.

The Court: Where?
The Witness: Sunset Avenue, Fort Monmouth.

Q. How long have you lived there?
A. 5 years.
Q. Do you recall on September 20th, 1950, being in Fairview?
A. Yes, I do.
Q. Do you recall where you were in Fairview that day?
A. I happened to stop in at a tavern on Bergen Boulevard.
Q. Where had you come from?
A. From the Bronx.
Q. And do you recall what time you arrived at this tavern?
A. Oh, it must have been about 3 o'clock, or shortly after three.

The Court: In the morning?
The Witness: Afternoon.
The Court: Thank you.

Q. 3 o'clock in the afternoon?
A. Yes, sir.
Q. Will you tell the Court and the Jury what you did when you arrived at the tavern?
A. Why I happened to stop in this tavern. I ordered [fol. 3] a glass of beer, and I sat down. That is the first time I ever had been in that place up there.

Mr. Mehler: I object to this, the characterization of the first time he had ever been there.
The Court: Yes. Yes, it will be stricken. Just tell us what you did.

Q. Just tell us what you did.

A. I went into the tavern and had a glass of beer, and I sat down near the entrance of where I went in to, and I noticed different fellows sitting around at the bar there, and I ordered a glass of beer, and I had a mouthful of beer, and I went to the men's room.

Mr. Mehler: I am sorry, sir. I am going to request Mr. Yager to speak up. He is looking at the floor and mumbling. I cannot hear him.

The Court: You ask him to speak up? I have heard every word, so far.

Mr. Malech: I can hear him, by the way.

The Court: Won't you keep your voice up and speak as slowly and distinctly as you can?

The Witness: Yes, sir.

The Court: Because all the jury have to hear you and the Court and the attorneys are entitled to hear you, also.

The Witness: Yes, sir.

[fol. 4] The Court: You had ordered a glass of beer and you had taken a mouthful of it?

The Witness: Yes, sir.

The Court: Is that right?

The Witness: Yes, sir.

The Court: Keep your voice up.

The Witness: And I noticed different fellows sitting at the bar there. And then——

Q. Did you notice——

Mr. Mehler: Now, I am going to object to this, your Honor please, here. I haven't objected that Mr. Malech said, "Tell us what happened." Now, the gentleman wasn't telling us what happened, and if Mr. Malech wants to ask him in question and answer, it is perfectly all right with me.

The Court: That is apparently what he is doing.

Mr. Mehler: Well, he hadn't——

Mr. Malech: I asked him what happened.

The Court: All right.

Mr. Mehler: Briefly, as near as I can figure out, he ordered a glass of beer and took a mouthful.

The Court: He began, further, to say something about he had noticed—at that point, Mr. Malech asked another

question. In other words, he interrupted the witness. He has a right to do that, I suppose.

[fol. 5] Q. Did you notice whether the defendant William Hoag was in the bar room?

A. Yes, I did. I noticed he was in there.

Q. Where was he sitting——

A. At the——

Q. ——with respect to where you were sitting?

A. At the other end of the bar.

Q. Do you know, if you can recall, whether or not the defendant was there before you got there or after?

A. He was already in there when I got in there and sat at the bar.

Q. Can you describe as best you can what you remember of what you saw at that time?

The Court: With refere ce to what?

Mr. Malech: With refe:ence to him seeing the defendant.

A. Well, I noticed him sitting at the end of the bar there. He was wearing a hat, a felt hat, and a jacket, a zipper type jacket there. And that is all I could see of him at that time.

Q. Is the man that you saw at the bar at that time here in Court today?

A. He is.

Q. Will you point him out to the Court and the jury?

A. The man with the jacket over there (indicating).

Mr. Mehler: Don't say a word. Just stand up. Do you mean this gentleman?

[fol 6] The Witness: That is right, sir.

Q. Will you tell us what happened from the time that you first saw this defendant?

A. Well, I went into the men's room, and I then came out back to the bar, and I finished the glass of beer, and I had ordered another glass of beer, and I don't recall if he was in there at the time I came back from the men's room.

Q. When did you next see him again?

The Court: You say you do not recall whether he was there when you came back from the men's room. Do you mean the men's room or the bar?

The Witness: At the bar.
The Court: All right.

Q. When did you next see William Hoag?
A. The next I seen William Hoag is when he came in the front door with a gun in his hand.
Q. Was anybody else with him?
A. I think there was two other fellows with him.

Mr. Mehler: I object to what he thinks, your Honor please.
The Court: The question is: Was anyone else with him.
The Witness: Yes, sir. There was two other fellows with him.

Q. And will you tell the Court and the jury what hap-
[fol. 7] pened then?
A. At that time William Hoag told me, "This is a stick-up." And he says for everyone to line up against the wall, which I did, and everybody else did, also.
Q. How far were you from William Hoag when he spoke to you?
A. About three and a half foot.
Q. Could you tell us, with respect to myself,—I will move closer—as to about how far he was from you?
A. Just about that distance from where you are standing to me.
Q. And did he speak to you at that time?
A. He did, because I was sitting right at the door entrance there.

Mr. Mehler: I do not want to interpose an objection. It is extremely leading and gives his answers. I think the question is extremely leading.
I do not object to this man telling a story; but it seems to me that, if the State is trying to establish a case by leading, it is very prejudicial to this defendant.
Mr. Malech: I haven't been leading. I have been asking him how far were you from the defendant William Hoag with respect to where I am standing? You tell me when to stop.
The Court: He did that.
Mr. Mehler: I am not objecting to the next question.

[fol. 8] The Court: We will have the next question and the Court will rule on it.

Mr. Mehler: (To the reporter). Mr. Robinson, please?

The Court: Let us have the next question.

(Pending question read by the reporter).

The Court: What is wrong with that, Counsellor?

Mr. Mehler: It is leading. What happened?

The Court: He has already testified that he did speak to him. We have his very words to this witness given. Now, he says, "Did he speak to you at that time?" I will allow it.

Q. Did he speak to you at that time when he was that distance from you?

A. Yes, he did.

Q. And what direction was he facing from where you were?

A. Facing directly towards me.

Q. Were you able to see him?

A. Yes, I was.

Q. Was anything between you and him?

A. No, there was not, nothing between us.

Q. What did he say to you at that time?

A. "This is a stick-up," he says, "everybody line up against the wall."

Q. Do you know whether he had anything in his hand at that time?

A. He had a gun in his hand.

[fol. 9] Q. Was there any question in your mind about that?

A. No, there was no question.

Q. Then what happened?

A. Then I lined up against the wall with the rest of the fellows, and they searched us, and they searched our pockets and all, and then they lined us up against the wall when they got through with all of us.

Q. What did they take from your pocket, anything?

A. Well, they took a wallet and a wrist watch off of me.

Q. Did they take any money?

A. Yes, there was.

Q. How much money?

A. About fifteen or $18.00 in my wallet.

Q. Following the removal of the money, what did they do, if you know?

A. They then told us to get into the rear room. This tavern had a dining room in the rear, and they told us all lie down on to the floor, which everybody did.

And the fellows then tied us up with rope, and they just tied my hands loosely, because I was the last one that they came to.

And, as soon as they left, I was able to get myself loose, and then I went outside and I ran across the street to a laundry where, immediately, I called the local police and told them that there was fellows that held up the bar room over at Gay's Tavern.

[fol. 10] Q. Can you describe to the Court and the jury the clothing or description of the man who stuck you up with a gun in his hand?

A. He had that felt hat on and a zip-type jacket and, I don't know exactly, recall what kind of pants, what color pants he was wearing.

Q. Were you able to see his companions closely?

A. I couldn't check too good, no, because I was too scared.

Q. Where were they, if you remember?

A. Well, they were all around the place. One was behind the counter, in the cash drawer there, taking the money out of the cash register. And then there was another one at the rear entrance, of the door of the rear entrance.

Q. I show you this photograph and ask you if you recognize it?

A. That is the same picture.

Q. Do you recognize it?

A. Yes, I do.

Mr. Malech: I would like to have this marked for identification.

The Court: It may be marked.

(Photograph marked Exhibit S-1 for identification).

Q. Do you remember when you saw this photograph?

A. Well, it was a couple of weeks after the hold-up.

Mr. Mehler: I object to this, to any reference so far to this photograph that has been marked for identification,

any reference to it at this time unless it is offered for evidence, it is objectionable.

[fol. 11] The Court: It certainly is objectionable; but I am going to allow him to tell when he saw it, a piece of evidence which has been marked for identification. He has a right to tell when he saw it. I will allow it.

Q. When did you see this photograph?

A. Well, I was told by a police officer——

The Court: Do not tell us what you were told.

Q. No. When did you see it?

A. I seen it a few weeks later at Gay's Tavern. I picked that picture out from—oh, quite a few pictures that were showed to me.

Q. Do you know who this photograph is a photograph of?

Mr. Mehler: I object to that as requiring more specific proof.

The Court: It is not being put in evidence. It is not being offered, is it?

Mr. Malech: No, not at this point.

Mr. Mehler: Are you going to offer it?

Mr. Malech: I am going to offer it.

Mr. Mehler: I have objections. It is ridiculous.

Mr. Malech: I am trying to explain to the jury how this defendant finally—how the witness finally met the defendant again.

[fol. 12] The Court: He says, "I saw the photograph" S-1, "two weeks later." Yes, proceed.

Q. And, after you had seen this photograph, when was the next time that you saw the defendant William Hoag?

A. The next time I saw William Hoag was in the month of December of 1951. I was brought over to New York City, to the jail, by one of the detectives here in Bergen County, and where they arranged the line-up, and I then stood—was brought in front of the line-up, and I marched up in front of about 12 men there, and I picked out William Hoag as the man.

Q. Was there any question in your mind——

Mr. Mehler: I object to that.

Q. ——at that time?

The Court: I will allow it.

Mr. Mehler: Your Honor, please, this was later when he said he identified the defendant.

The Court: That is right. You may proceed.

Q. Was there any question in your mind as to William Hoag's identity at that time?

A. No, there was not.

By the Court:

Q. Have you got that date? Do you know when that was?

A. The month of—sometime during the month of December of 1951.

Q. December, 1951?

A. Yes, sir.

[fol. 13] By Mr. Malech:

Q. And may I ask you whether the man that you saw on that date is here in Court?

A. Yes, he is.

Q. Where is he?

A. That man (indicating).

Q. The same man?

A. The same man, over there.

Mr. Malech: Cross-examine.

Cross-examination.

By Mr. Mehler:

Q. Mr. Yager,——

A. Yager.

Q. ——there is no doubt in your mind that this picture that you identified at Gay's Tavern in Cliffside Park, the same man, is the man that you saw in New York——

A. That is right.

Q. ——in the line-up?

A. That is right.

Q. How many times did you go to the line-up?

A. One time.

Q. And you saw this picture of Gay's Tavern?

A. That is right.

Q. And, as a result of seeing this picture, you then went to New York and you said, "That is the man"?

A. That is right.

Q. Is that right?

A. Yes, sir.

Q. What time of the day was this?

The Court: Of what? What time of day was what?

Mr. Mehler: Of this alleged robbery, or the robbery in [fol. 14] Fairview.

A. I believe it was around 3 o'clock in the afternoon.

Q. I see. And where had you been that day?

A. In the Bronx.

Q. What part of the Bronx?

A. Over to my wife's grandmother's house.

Q. And you were alone?

A. That is right.

Q. What time did you get to the Bronx?

A. In the morning.

Q. What time?

A. Oh, I don't know exactly, between 9 or 10 o'clock.

Q. This was four years ago and one month. Is that right?

A. That is right.

Q. Did you have lunch in the Bronx?

A. That is right.

Q. Whereabouts?

A. My wife's grandmother's house.

Q. And you stayed at your wife's grandmother's house with her from 9:30 until after lunch?

A. That is right.

Q. And you then left at what time?

A. Oh, it was after 2 o'clock.

Q. And how did you proceed to New Jersey?

A. Over the George Washington Bridge.

Q. And where were you going?

A. To South Jersey, where I live.

Q. Where is that in South Jersey?

A. Fort Monmouth.

Q. Port Monmouth?

A. Port Monmouth.

[fol. 15] Q. Where is Port Monmouth?
A. In Monmouth County.
Q. How many people were in the bar when you came in?
A. I don't know exactly. I never counted them.
Q. You didn't count them?
A. No.
Q. I didn't ask you that. But do you know how many were there?
A. The bar was pretty well filled up.
Q. Pretty well filled up. You came in, and you say you sat near the entrance?
A. That is right.
Q. Did they have waiter service there?
A. Not at that time.
Q. Well, do they at other times?
A. I really couldn't recall.
Q. What do you mean by "Not at that time"?
A. There was no waiters there.
Q. Did you go to the bar?
A. That is right.
Q. And you ordered a glass of beer?
A. That is right.
Q. And you sat near the entrance?
A. That is right.
Q. Did you drink that beer?
A. Yes, I did.
Q. And you then went to the men's room?
A. No. I sat at the bar and took a mouthful, and then I went to the men's room.
Q. I see. Did you order another glass of beer?
A. I did.
Q. Did you drink that beer?
A. I didn't have time.
Q. Did you have any other beers during that day?
[fol. 16] A. No, I didn't.
Q. That was the first stop that you made?
A. That is right.
Q. By whom are you employed, Mr. Yager?
A. At that time I was employed with my father-in-law.
Q. In what capacity?
A. Painter.
Q. Painter?

A. Yes.
Q. You testified here in 1951, didn't you?
A. That is right.
Q. Didn't you say you were a shoe salesman?
A. I was a shoe salesman and painter.
Q. Oh, you were both?
A. That is right.
Q. How many times had you been to Gay's before this occasion?
A. Never.
Q. Never?
A. Never.
Q. The first time you had ever stopped there?
A. That is right.
Q. What are you doing now for a living?

The Court: What?

Q. What are you doing now for a living?
A. Still painting on my own.
Q. You are painting on your own. Contracting or subcontracting?
A. I go out and paint places, houses, by myself.
Q. What is your social security number?
[fol. 17] A. I don't know.

Mr. Malech: I object.

Q. You do not know?
A. Do you think I recall those things?
Q. Now, you testified to something——

Mr. Malech: I object, what his social security number is.
Mr. Mehler: It is important.
The Court: I will permit it.

Q. What is your social security number?
A. I really cannot say.
Q. That is something you use every week, isn't it?
A. That is right.
Q. And you don't know that, but you remember all of this detail of some four years and one month ago. Have you been to Gay's since?
A. I dropped in there later on.
Q. I mean, outside of looking at pictures?

A. I think I was in there a couple of times after that I don't know exactly how many times I was in there after that.

Q. How many times before?

A. Before what?

Q. Before this day.

A. Before the robbery?

Q. Yes.

A. I never was in the place before.

Q. You were never in the place before?

A. The robbery.

Q. All right. You came into the place, and you say [fol. 18] that Mr. Hoag was seated there?

A. That is right.

Q. Wearing a felt hat?

A. That is right.

Q. What color?

A. Brown.

Q. And he was wearing a jacket?

A. That is right.

Q. What color was the jacket?

A. A light tan.

Q. Then, when you came out of the men's room, he wasn't there?

A. I don't recall.

Q. Well, when did you see him next?

A. The next I see him was when he came in the front door.

Q. I am sorry, Mr. Yager. You saw him coming in the front door?

A. That is right.

Q. Now, you had been seated near the entrance, hadn't you?

A. That is right.

Q. When you came in, you said,——

A. That is right.

Q. —you were having—you ordered a glass of beer, took a mouthful, and then you went to the men's room. Well, where was he seated, at the other end of the bar?

A. Yes, he was.

Q. How big is Gay's?

The Court: How big, what?
Mr. Mehler: How big is Gay's Tavern?
The Court: Oh!

A. Do you mean for actual footage of the place?
Q. Yes. The length of the bar.
A. Oh, the bar is, I would say, 12 to 15 feet long.
[fol. 19] Q. 12 to 15 feet long?
A. Yes.
Q. How many windows in it?
A. I don't know.
Q. Well, in 1951, you knew?
A. There was windows in the front part there, but I don't know the exact amount.
Q. Didn't you testify in 1951 there were two windows?
A. Where?
Q. In Gay's.
A. There was more than two windows in the bar.
Q. Now there is more than two windows?
A. There is two windows, I believe, in the front part of the building.
Q. Never mind. You can explain later, I hope.

Mr. Malech: Your Honor please, I respectfully submit that that last remark be stricken.
Mr. Mehler: I will consent to it. It was out of order, and I apologize to the Court.
The Court: It will be stricken, yes, sir.

Q. You came out and had another glass of beer, or you ordered another glass of beer? Let us put it that way.
A. Yes.
Q. You don't know whether Mr. Hoag was there at that time or not?
A. I don't recall.
Q. Now, the end of the bar, he was seated from you some 12 to 15 feet, you say?
A. That is right.
Q. Was there any other door there?
A. Well,——

The Court: Where?
[fol. 20] Mr. Mehler: At the other end of the bar. He said he sat near the entrance.

A. Well, there was two doors in the place over on that back wall. There was one door behind the bar room, the bar itself; and there was another door over to the entrance to the dining room.

Q. So that there were two entrances and two exits. Right?

A. Yes. There is two entrances and two exits into the tavern.

Q. Now, with respect to the entrance that you came in, and he was seated at the other end of the bar, where wa the men's room?

A. Way in the dining room, the rear of the dining room.

Q. So that he was there when you came in, with the felt hat on, a brown felt hat?

A. That is what I said.

Q. And you went to the men's room, and you, of necessity, passed him?

A. Pardon me?

Q. You, of necessity, psased him? You had to go by him, didn't you?

A. Well, his back would be towards me.

Q. Well, did you ever see his face when you first came in?

A. Yes, as I was sitting at the bar.

Q. Well, is it a straight bar or a circular bar or a rectangle, or what?

A. Towards the entrance to the door, it is a small part of the bar, and then she turns up and goes straight down. [fol. 21] goes straight down, it is like an L-shape bar.

Q. And which side of his face did you see?

A. His left side.

Q. You do not see his full face?

A. I believe I have, I did.

Q. What did you say?

A. I did.

Q. At that time?

A. That is right. When I sat down at the bar.

Q. Yes.

A. Because, where I was sitting, I could see directly right straight down at the back.

Q. At the bar?

A. That is right.

Q. But you just told me, when you went by him, you couldn't see anything because his back was to you?

A. If I am going to the men's room, his back would be turned to me.

Q. If you are looking straight down the bar, you say he has his head this way, and you only see the side of his face, don't you?

A. When I go into the men's room, you pass everybody sitting at the bar. They have their backs turned to you.

Q. Was there a mirror?

A. No, there was no mirror.

Q. Was he drinking?

A. Yes, he was.

Q. What was he drinking?

A. A glass of beer. Everybody had beers. There was all beers lined up there.

[fol. 22] Q. No one was drinking whiskey?

A. I didn't notice.

Q. When you came out of the men's room, was he there?

A. As I said before, I don't recall.

Q. What did you do?

A. I sat back at the bar and had a beer.

Q. Ordered another beer?

A. I drank the beer that I had on the bar, first.

Q. Oh, you finished the beer that you had on the bar first, and then you ordered another one?

A. That is right.

Q. Was Hoag at the bar at that time?

A. I don't recall.

Q. Well, you had the same view as you had when you came in?

A. I wasn't paying any attention to anybody, I didn't know anybody in the place.

Q. That was the first time you had ever been there?

A. That is right, that is the first time I had ever been in the place.

Q. You were pretty scared, weren't you?

A. Sure, I was scared. You would be a-scared too, if you were held up.

Q. I don't doubt it. I don't doubt it the least bit and, amazingly enough, when I get scared, I forget things.

As a matter of fact, you said before you were too scare to notice too much, weren't you?

[fol. 23] A. I said was scared, yes. I didn't notice th other fellows there, because I was lined up against th wall.

Q. All right. Now, as to this 12 or 15 foot bar, you can in and you sat on this end; you call it the entrance?

A. Yes.

Q. Is that the entrance on Bergen Boulevard?

A. Yes.

Q. He was on the other end?

A. Who?

Q. Mr. Hoag.

A. At what time? He was sitting down at the othe end of the bar.

Q. How many other people were there?

A. I don't recall. There was quite a few fellows at th bar. I don't know exactly how many.

Q. Did he just strike you as a fancy in your mind?

A. No, he didn't, no.

Q. Well, can you describe the other people that wer there to me?

A. The appearance of half of the fellows at the cour room were in the bar.

Q. They were there?

A. Yes.

Q. Three or four of them?

A. Oh, I don't know exactly.

Q. What were they drinking?

A. I see some beer lined up there at the bar there.

Q. What were the other people wearing?

A. They were pretty—some of them were pretty wel dressed up.

Q. Well, in what?

[fol. 24] A. Dressed up in their good clothes.

Q. Good clothes?

A. Yes.

Q. What color suits?

A. I couldn't answer that.

Q. You couldn't answer that?

A. No.

Q. What was the license number on that day?
A. "M-R"—I am trying to think, now.
Q. What kind of a car were you driving?
A. I will say a '47 Chevrolet.
Q. Where was it registered from?
A. Monmouth County.
Q. In your name or your father-in-law's?
A. In my name.
Q. What color was it?
A. It was grey.
Q. What color car do you have today?
A. Blue.
Q. And you were painting and selling shoes at that time?
A. That is right.
Q. And now you are just painting?
A. That is right.
Q. When did you next see Mr. Hoag?
A. What do you mean?
Q. Well, you came in,—if I am wrong, you stop me, because if I am wrong, I am sure Mr. Malech will stop me in my misunderstanding. You came in the entrance, you sat at the end of the bar, which is some 12 to 15 feet long; you looked down at the end of the bar and you saw Mr. Hoag the defendant, Mr. Hoag. In between the defendant [fol. 25] and these 12 or 15 feet, there were several people, some three or four. Is that right so far?
A. Right.
Q. And you ordered a glass of beer. You took one sip, and you went to the men's room?
A. Right.
Q. At that time, Mr. Hoag was still at the end of the bar, and he had his back to you?
A. Will you please repeat that last one?
Q. At the time that you went to the men's room you passed Mr. Hoag?
A. That is right.
Q. He had his back to you?
A. That is right.
Q. Is that right?
A. That is right.

Q. And when you came out of the men's room, you don't know whether he was seated at the end of the bar or not?

A. That is right.

Q. And you went back to your end of the bar?

A. Yes.

Q. And you proceeded to order another beer?

A. Yes.

Q. Now, when did you again——

The Court: Excuse me. I thought he said he had finished one glass.

The Witness: I did.

Mr. Mehler: Ordered and not finished, and he was wasting money, in other words.

Q. You finished your glass of beer and then you ordered another?

A. That is right.

Q. Now, when did you next see Mr. Hoag?

[fol. 26] A. The next I seen of Mr. Hoag was when he came in the front door with the gun in his hand.

Q. Which hand?

A. His right hand.

Q. He didn't have two guns?

A. I didn't notice that.

Q. You didn't notice that?

A. No, sir. I only noticed one gun, that is enough, believe me.

Q. One gun is enough, and one mistake is enough, isn't it, Mr. Yager?

A. No.

Q. It is not? You were frightened?

A. Sure.

Q. Then you were taken in the back room. Where your hands were up, and you were relieved of your money, fifteen to $18.00?

A. That is right.

Q. And then you were brought to the back room and tied?

A. That is right.

Q. You were tied very loosely?

A. That is right.

Q. And then you became untied?
A. I got myself loose.
Q. You got yourself loose, and then you said you ran across the street and called the police?
A. That is right. The reason why I ran,——
Q. No, never mind the reason. We will come to it.
A. Go ahead.
Q. Why? Did you first untie the other fellows?
A. Why? I didn't untie anybody else.
Q. Untied anybody else?
[fol. 27] A. Untied anybody else, I don't know.
Q. You gave a statement to the police, didn't you?
A. That right.
Q. Did you tell them that you were tied?
A. I did.
Q. Was it Mr. — was it this defendant that you claim tied you?
A. I don't know exactly who tied me, because I was laying on the floor, face down.
Q. And you are positive you told the police you were tied?
A. That is what I told them up at the headquarters when they brought us down there.
Q. Yes. Who finally untied the other people?
A. I don't know.
Q. You don't know. September the 20th, what day of the week was that?
A. Wednesday.
Q. You were not working that day?
A. No.
Q. When you say you sold shoes, or you sold shoes, did you operate out of a store or—how did you sell shoes?
A. Through a mail order catalogue.
Q. You would write and solicit and you would fill them?
A. No, just going around to different people.
Q. Yes. What company shoes did you sell?
A. At that time, Tanner Shoes Company.
Q. Tanner?
A. Yes.
Q. T-a-n-n-e-r?
A. Yes.

Q. Where are they?
A. In Massachusetts.
[fol. 28] Q. Whereabouts?
A. (No audible response).
Q. Oh, don't tell me you don't know the town.
A. Now, I think a minute.

The Court: Yes, Counsellor. He has a perfect right to take his time, if he wishes to.
Mr. Mehler: Yes, sir.
The Witness: Boston, Massachusetts, it was.

Q. Boston?
A. Yes.
Q. What street in Boston?
A. I don't recall.
Q. How long did you work for them?
A. I don't know exactly. I don't recall how many months I worked for the company. It isn't just a regular job.
Q. Just answer the questions, please, Mr. Yager. You don't remember how long you worked for them?
A. No, I don't.
Q. You do not know the street it is located on?
A. I don't recall.
Q. Boston is a pretty big city. You would have to mail orders up there, didn't you?
A. That is right.
Q. When did you leave them?
A. I don't recall.
Q. You don't remember when you left?
A. It is not a regular job. It is just a side job.
Q. Well, if what you testified you were doing,——
A. I was doing, sure, a side job as a shoe salesman, and painting with my father-in-law.
[fol. 29] Q. Making an income out of it?
A. That is right, it was a side income.
Q. You didn't mention anything about painting at the last trial?
A. I was painting.
Q. You did not mention it when you were asked what you did?

The Court: Is that a question?

Mr. Mehler: Yes.

A. I don't recall if I did mention it or not. I mentioned it to the authorities that I was painting.

Q. Who else was at your grandmother's, or you wife's grandmother's?

A. Who was there?

Q. Yes.

A. I believe, when I got up there, was just my wife's grandmother there.

Q. When you got up there?

A. That is right.

Q. Had you dropped somebody off on the way?

A. No, I didn't.

Q. What street in the Bronx did your wife's grandmother live on?

A. 149th Street and Bergen Avenue.

Q. What is the number?

A. I don't recall.

Q. Had you been there previously?

A. No.

Q. The first time you had been there?

A. No.

Q. Well, had you been there before?

A. Sure, I had been there before. My wife was brought up in there.

Q. I thought you said——

A. All right.

[fol. 30] Q. I don't want to quarrel with you.

A. I don't, either.

The Court: Just a minute, people. Let us take it easy and not get excited.

Q. What is your wife's grandmother's name?

A. Mrs. Knott.

Q. How do you spell that?

A. K-n-o-t-t.

Q. And her first name?

A. Margaret.

Q. Margaret. And you said you don't know the number?

A. I don't know the number.

Q. You have been there before?

A. That is right.
Q. How many times?
A. Quite a few times.
Q. Quite a few times?
A. Yes.
Q. She was very close with your wife, was she?
A. My wife was brought up by her grandmother.
Q. Therefore, you courted your wife at that address?
A. Yes.
Q. And you still don't remember the number?
A. I don't remember. Offhand, I couldn't say the number.

The Court: Is that all?

Q. Now, you then went over to New York. I mean, you went over to New York at the line-up. Is that right?
A. That is right.
Q. Who were you with?
A. I was with two of the fellows from the Bergen County Prosecutor's Office.
[fol. 31] Q. And where was the line-up held?
A. I believe at the Raymond Street jail, downtown New York.
Q. Brooklyn?
A. No.
Q. Center Street?
A. I really don't know what it was, downtown New York.
Q. Raymond Street jail is in Brooklyn.
A. Well, it is not the Raymond Street, it is downtown New York, around Canal Street.
Q. Are you familiar with jails, that you mention Raymond Street?
A. No.
Q. How many men were in the line-up?
A. Nine to twelve men.
Q. This picture was with you?
A. No.
Q. So that you didn't have the picture?
A. I don't know if any of the men from the Prosecutor's Office had it or not. I couldn't say.
Q. You don't remember. What was the defendant wearing on this day?

A. He was also wearing a hat and a jacket.
Q. A brown hat?
A. That is right.
Q. And what color jacket?
A. All I know, it was a zip-type jacket, and I don't recall exactly what color it was. All the men were wearing hats.
Q. What were you wearing that day?
A. I was wearing a suit.
[fol. 32] Q. A jacket and pants?
A. That is all.
Q. What color?
A. I don't recall.
Q. What color tie did you have?
A. I don't recall.
Q. Shoes?
A. I don't recall what color the shoes were.
Q. How many men came into this Gay Tavern, Mr. Yager?

The Court: When do you mean?
Mr. Mehler: At the time of this alleged robbery this defendant is charged with.

A. Three men.
Q. Three men. What did the other men look like?
A. I was too nervous to notice too much about the other men.
Q. But you weren't too nervous to notice about Mr. Hoag?
A. Well, he faced me completely as he came in to the door.
Q. I see. But, first, he had been in there before?
A. That is right.
Q. Before you?
A. That is right.
Q. I see. Was the television set on?
The Court: What is that?
Q. Was the television set on?
A. I don't recall that.
Q. Do you like baseball?
A. That is right.
Q. Did you see any of the men get pistol whipped or [fol. 33] slapped in the face with a pistol?

A. All I heard of them, I didn't see, actually see it.
Q. You didn't see that?
A. No, I didn't.

Mr. Mehler: That is all.

Redirect Examination.

By Mr. Malech:

Q. Mr. Yager, do you know what time the sun rose on September 20, 1950? Do you know what time the sun rose?
A. It rose around 6:50.
Q. Do you know exactly?
A. No, I don't.
Q. Do you know what time it set that day?
A. No, sir, no, I don't.
Q. Why do you remember that day? Why do you remember September 20, 1950?

Mr. Mehler: I object to that.
Mr. Malech: If your Honor please, he attacked this man's credibility by trying to show he couldn't remember certain things. I want to know, and I think the jury is entitled to know.

Q. Why do you remember this date?

The Court: I will allow it.

A. Anybody would have a gun stuck into them, they would sure remember the fellow's face, directly in front.
Q. Is there any question in your mind——

Mr. Mehler: I object as not being proper redirect ex-
[fol. 34] amination. He asked that question on direct.
The Court: Counsellor, it is proper redirect after your cross-examination. You endeavored to test his memory, as you had a perfect right to do.
Now, this is redirect on that cross, I think.
Mr. Mehler: It isn't on the cross; it is redirect; on his direct, he asked the question on direct examination.
The Court: I will allow it.
Mr. Mehler: May I have an exception?
The Court: Certainly. You do not need it. It is noted.

Q. Is there any question in your mind now as to who you saw on September 20th in 1950 with a gun in his hand, facing you?

A. No, there isn't any.

Q. Who is that man?

A. The man sitting over there (indicating).

Mr. Malech: That is all.

Re-cross-examination.

By Mr. Mehler:

Q. You are positive of it?

A. I am positive.

Q. You couldn't remember what the name of the shoe company was?

A. I know.

Q. You don't know your wife's grandmother's street number?

A. No.

Mr. Mehler: That is all.

[fol. 35] A. (Continuing) 528, I am pretty sure.

The Court: All right.

(Witness excused).

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Mr. Malech: Your Honor, the State rests.

The Court: Pardon?

Mr. Malech: The State rests.

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[fols. 36-39] REPORTER'S CERTIFICATE (omitted in printing)

[fol. 40] ANTHONY DOTTINO, called as a witness on behalf of the defendant, being first duly sworn, testifies as follows:

The Court: How do you spell it?
The Witness: D-o-t-t- double "t"-i-n-o.

Direct Examination.

By Mr. Mehler:

Q. Mr. Dottino, where do you reside?
A. 317 8th Street, Fairview.
Q. New Jersey?
A. Yes.
Q. Now, on the or during the afternoon of September the 20th, 1950 were you in Gay's Tavern?
A. Yes.
Q. On Bergen Boulevard in Fairview, New Jersey?
A. Yes.
Q. Were you there at the time this robbery took place?
A. Yes.
Q. How long had you been there?
A. I was in there a few hours.
[fol. 41] Q. How many men came into the tavern?
A. What do you mean?
Q. How many of these robbers came into the tavern?
A. I was sitting on a stool in the corner of the tavern. And this Yager was sitting opposite me about four feet from the front entrance of the tavern. There was four or five of us.

The Court: Just a minute. Let us have an answer to the question. Make it as short as you can. Did you hear the question?
The Witness: He asked me how many men was in there.
The Court: No.

Q. How many of these robbers came in?
A. How many robbers?
Q. Yes.
A. I only noticed the one fellow come into the front door.
Q. And how many men or how many patrons were in the tavern?
A. There was three or four of us in there.

The Court: Three or four. Yes?

Q. Mr. Dottino, did you see Mr. Yager on that date?
A. Yager, yes.
Q. Did you see him enter that tavern?
A. I didn't see him enter it.
Q. But you saw him in the tavern?
A. He was in there positively.
[fol. 42] Q. Now, at any time on that day, did you see Mr. Hoag, the defendant in this case?
A. No, sir.
Q. Was he one of the robbers that came into the tavern?
A. No, sir.
Q. Now, you were frightened too, weren't you?
A. I got hit in the face.
Q. You were what?
A. I got hit in the face.
Q. With a pistol?
A. Yes.
Q. Have you ever see Mr. Hoag in that tavern?
A. Never.
Q. You saw him in 1951, did you not?
A. I seen who?
Q. Mr. Hoag, here in Court, in 1951.
A. I seen him here.
Q. And you saw him again today?
A. That is right.
Q. Have you ever seen me before today?
A. No, sir.
Q. You lost money too, did you not?
A. Yes, sir.

Mr. Mehler: Cross-examine.

Cross-examination.

By Mr. Malech:

Q. Mr. Dottino, you say that you saw Mr. Yager, the man who just testified before you, in the tavern on September 20th?
A. On September 20th; and I seen him previous times before that in the place.
Q. You saw him there that day?

A. That day, I seen him there, yes, sir.

[fol. 43] Q. Are you antagonistic to Mr. Yager for any reason?

A. I don't know the man from Adam.

Q. Are you antagonistic?

A. What do you mean? I don't know what the word means.

Q. All right.

Mr. Malech: I will withdraw the question.

Q. Did you know Mr. Yager?

A. I know—I didn't know him to talk to him. I seen him in the place.

Q. He was there that day?

A. Of the stick-up, yes.

Q. And the time, it was about 3 o'clock in the afternoon?

A. That is right.

Q. You say that you saw only one man come in the tavern with a gun drawn?

A. From the front entrance.

Q. From the front entrance?

A. That is right.

Q. Do you recall giving a statement to the Prosecutor's Office on July 24th, 1951?

A. Do I recall giving a statement?

Q. Yes.

A. I don't remember.

Q. I show you this statement and ask you if you recognize that signature? Is that your signature?

A. Yes, that is my signature.

Mr. Malech: May I have the——

Q. You may read it.

A. (The witness refers to statement in question).

[fol. 44] Q. Read it to the jury, if you will.

Mr. Mehler: I object.

Q. Is that your statement?

A. That is my statement. It looks like the man, but it isn't the man, because the man that came in the front door was dark. His hair was pitch black..

The Court: Just a minute. Yes or no?

Q. I will show you a photograph and ask you if you have ever seen that before?

The Court: The photograph, you mean?
Mr. Malech: The photograph.

Q. Have you ever seen the photograph?

The Court: Not the man that was in the place.

A. The photograph they showed me.
Q. What?
A. They show it to me once.
Q. Have you seen this photograph?

The Court: The answer is "Yes".

Q. I show you a signature here, and ask you——
A. That is my signature, yes.
Q. Is that your signature?
A. Yes; but that isn't the man that stuck us up.
Q. Isn't it true that you were asked on July 24th, 1951 whether you could identify this photograph?
A. I didn't identify it.
Q. Is it true that you were asked whether or not you rec-
[fol. 45] ognized this man from the photograph on July 24th, 1951? Yes or no.
A. I don't recall it.
Q. Well, didn't you say that you signed this?
A. I signed it.

The Court: Just a minute.
Mr. Mehler: Let him answer the question.
The Court: You are to answer the question as a witness here.
The Witness: Yes.
The Court: And your counsel, or the attorney, for the defendant will take care of you.

Q. What was the purpose of your signing this photograph?
A. I was never in the stick-up. I didn't know. I signed it. That is all.

Q. There was no reason for your signing the photograph? Is that what you would have us believe?

A. It looks like the man, like I told the Prosecutor when he came with the pictures; but I wouldn't swear it was the man, because the man that come in the front door, like I told you before, had dark complexion, and he had slick black hair, and he had a little black gun when he come.

Q. Isn't it true, referring to this photograph, that you said that he is the man who came in the front door with the gun and lined everybody against the front window wall? Isn't it true that you said that?

A. I said it looks like the man, but it isn't the man that [fol. 46] stuck me up, stuck us up.

Q. Did you say that? I will read it for you, and I ask you if you said it exactly as I am reading it. "He is the man who came in the front door with a gun and lined everybody against the front window wall."

Did you say that in the statement that you signed?

A. I don't recall it.

Q. I will show you the statement again, and ask you if you didn't say that?

A. (Referring to statement) I cannot answer it.

Q. What?

The Court: You cannot answer it?

The Witness: No.

The Court: Do you understand?

The Witness: Maybe I signed this here; but I didn't read this before I signed it.

The Court: Just a minute. Do you understand the question, first?

The Witness: That is right.

The Court: You were asked to say whether, on a certain day, you said that, those words, "He is the man that came in the front door," and so forth?

The Witness: Your Honor, I don't recall it.

The Court: You don't recall it?

[fol. 47] The Witness: No.

Q. Well, does this refresh your recollection?

A. It doesn't refresh my recollection.

Q. Does the signature refresh your recollection?

A. That is my signature.

Q. Why did you sign it?
A. What?
Q. Why did you sign this?
A. I signed a paper for him. I didn't know what I was signing; but I signed it.
Q. Why did you sign this photograph?
A. I cannot answer you.
Q. You cannot answer.

Mr. Malech: I would like to mark this statement for identification, if the Court please.
The Court: It will be marked.

(Paper marked Exhibit S-2 for identification).

Mr. Malech: No further questions.

Redirect Examination.

By Mr. Mehler:

Q. Mr. Dottino, did you sign a subsequent affidavit for the Prosecutor's Office later, after the first trial?
A. Gee! I don't recall it.
Q. You testified in the other trial?
A. I did.
Q. Today, are you testifying exactly as you testified in the other trial?
A. That is it. It looks like the man, but it isn't the man [fol. 48] that stuck us up, positively.
Q. That is the same testimony you gave us before?
A. That is right, because the fellow came in the front door and, if anybody saw him, it was me.
Mr. Mehler: That is all.

Recross-examination.

By Mr. Malech:

Q. If anybody came in the front door, you saw him?
A. If any one saw him, it was me.
Q. Is that what you just testified to?
A. I was sitting in the corner. I will answer your question.
The Court: Just a minute. Do not get excited, take it

slow. The prosecutor has asked you a question, and you can answer that yes or no.

Q. Is that what you just testified to, just a moment ago?

A. The man came in the front door.

Mr. Malech: Will the court reporter please read my last question and the answer?

(Previous question and answer read by the reporter).

Q. So that you are sure that if anybody saw him, it was you?

A. Right.

Q. Now, after that, on July 24th, 1951, weren't you asked whether or not you had seen the man who came in that front door?

A. Yes.

Q. And weren't you shown this photograph?

A. They showed it to me, yes; but it is not the man.

[fol. 49] Q. And didn't you make the statement on July 24, 951 that that is the man?

A. No, sir.

Q. Didn't you make this statement, which I will read to you?

A. You can read it.

Mr. Mehler: I object to this. This man is not a defendant or a party to the action.

The Court: I will allow it.

Q. Didn't you say: "That photograph you show me is the one you showed me and others several days after the hold-up. He is the man who came in the front door with a gun and lined everybody up against the window wall"?

"Question: Will you put your signature on the photo I show you,"——

A. Listen!

Q. ——"if he is the man you identified?"

"Answer: Yes, I'll do that."

And didn't you then put your signature on?

A. Look? You ask me the same question again, your Honor. That is not the man. That is all I can answer. It is not the man, that is all.

Mr. Malech: That is all.

[fol. 50] CHARLES GALIARDO, called as a witness on behalf of the defendant, being first duly sworn, testifies as follows:

Direct Examination.

By Mr. Mehler:

Q. Mr. Galiardo, where do you reside, sir.
A. 302 Anderson Avenue, Fairview.
Q. Are you the owner of Gay's Tavern?
A. I used to be the owner.
Q. Were you the owner on September 20, 1950?
A. I was.
Q. Were you present when this robbery took place?
A. I was in the place.
Q. Did you see the men?
A. I didn't see the men enter the place.
Q. You didn't see them. Did you see them leave?
A. I did not.
Q. Did you see any of them at all?
A. Just one fellow.
[fol. 51] Q. Did you see Mr. Hoag, the defendant?
A. Well, I cannot swear that it was him, and I cannot swear that it wasn't.
Q. Then you had previously identified a photo that might have been him?
A. I did but, having met him,——
Q. This is the same testimony you gave in 1951, is it not?
A. Yes, sir.
Q. And having seen him in the flesh, you do not feel as though you can positively identify him. Is that right?
A. I do not.

Mr. Mehler: Cross-examine.

Cross-Examination.

By Mr. Malech:

Q. Mr. Galiardo, do you remember giving a statement in the Prosecutor's Office?
A. I gave a statement?

Q. On this matter, do you remember being shown a photograph?

A. I do.

Q. Do you know whose signature is on that photograph?

A. It should be made mine on there.

Q. You mean that this should be yours. Well, did you put your signature on it?

A. I did.

Q. Why?

A. I was asked to.

Mr. Mehler: I object to the question.

The Court: He can state the circumstances under which he signed.

A. (Continuing) I was asked downstairs in the Prosecu-
[fol. 52] tor's Office if this was the man, and I says I think it may be him, and they asked me if I would sign my signature to that, and I says I would.

Q. In the statement that you gave to the authorities, didn't you say that you recognized the man who stuck us up?

A. No, I didn't say that.

Q. All right. I will read it to you.

Mr. Mehler: I object, your Honor please.

Q. I will ask you this: Do you recognize that signature?

A. That is mine.

Q. Will you read that statement, please?

The Court: To yourself.

A. (Witness referring to statement) I remember this, sir.

Q. Your remember this?

A. Yes, sir.

Q. Do you remember saying——

Mr. Mehler: I object, your Honor please, to any reference to the statement.

The Court: I think he has a perfect right to ask the witness on a certain occasion, "Did you say this"?

Mr. Mehler: Now, it has not been established this is in this man's handwriting. It is just his signature.

[fol. 53] The Court: This man says he remembers the statement. That is why I permitted that.

Mr. Mehler: Well, I think I have a right to cross-examine him before he goes into it, and your Honor is permitting the State to go in and ask questions of the witness on something that was propounded by the State without giving the defendant the right of cross-examination on the statement.

The Court: I am simply permitting a question as to whether he used certain words on a certain day.

Mr. Mehler: If he used that type of words, sir, that, obviously,——

The Court: If he said certain things. You see, he has already, Mr. Mehler, said that he remembers it.

Mr. Mehler: He remembers signing the statement.

The Court: No. He says, "I remember the statement," and he says it is his signature. At least, I understood him to say that.

Is that your signature on the statement?

The Witness: That is right, sir.

The Court: I only permit the State to ask, "Did you on a certain day say something or not?" He can deny it, if it is untrue. Go ahead.

Q. Did you, on July 24, 1951, in this statement say: "I [fol 54] said that in going over the pictures of suspects of a tall nature, 6 feet 2 or 3, I recognized the man who stuck us up. As you show me the picture, it is the same one I picked out in New York City."

"Question: Will you put your signature on the photo you identify?

"Answer: Yes, I will."

A. May I answer?

Q. And, pursuant to this, did you put your signature to the picture?

A. May I answer before that?

Q. Did you or did you not?

The Court: Yes, you can answer.

A. I would like to tell you that I understood, I said I thought this was the man.

Mr. Mehler: I would like him to answer whether he did, on what basis he can explain it.

The Witness: I put my name on there.

Q. Why did you put your name there?
A. Because I thought it was the man,——

Mr. Malech: That is all.
The Witness: (Continuing)—because I told Mr. De Marco that I didn't think—I couldn't say positively.
The Court: All right.
The Witness: And, your Honor, may I say something else?
[fol. 55] Mr. Malech: I would like to mark this statement for identification, your Honor.

(Paper Marked Exhibit S-3 for Identification).

Redirect Examination.

By Mr. Mehler:

Q. Mr. Galiardo, the words that were just read to you, were they your words or were they written by someone else?
A. They were written by someone else.
Q. And did you talk to Mr. De Marco?
A. I had talked to Mr. De Marco.
Q. And did you tell him you thought——
A. I told Mr. De Marco, and I told someone else downstairs, the stenographer or somebody, I don't know.
Q. But you thought——
A. That I thought it was the man.
Q. And that was before you had seen him in the flesh?

(Question repeated by the reporter).

A. Let me understand this.

The Court: No. Answer this.
The Witness: I just don't know what he means.

Q. You said you thought you hadn't seen him. You identified the picture, but you thought that picture——
A. That is right.
Q. —represented the individual?
A. That is right.
Q. And you testified at the trial in 1951, did you not?

A. I did.

[fol. 56] Q. Did you testify to this same extent and the same statement you are making here today?

A. Practically the same, I believe.

Q. But you now have had occasion to—

The Court: Do not lead him.

Mr. Mehler: Sir?

The Court: Do not lead him. I say, do not lead the witness.

Mr. Mehler: Believe him?

The Court: Lead, L-e-a-d.

Q. I will ask you, Mr. Galiardo, you saw Mr. Hoag in 1951?

A. That is right.

Q. You saw him on—you see him today?

A. That is right.

Q. Was Mr. Hoag one of the men that came into your establishment on September the 20th, 1950?

A. I cannot say positively.

Q. Thank you.

Recross-Examination.

By Mr. Malech:

Q. He may be the man? He may be the man?

A. I don't know. He may and he may not.

Q. I say, he may?

A. He may and he may not.

Mr. Mehler: The State is not going to try a serious offense of this crime on a "may".

[fol. 57] Mr. Malech: I do not think there should be a summation at this time. I asked him his opinion, and I asked him to repeat, and he said, "It may be and may not."

Q. As a matter of fact, you definitely did identify him in 1951, didn't you?

A. Just what do you mean, that I definitely did identify him?

Q. Didn't you say, referring to this photograph that this is the man?

A. I still go back and say I think this is the man.

Q. Well, doesn't this statement refresh your recollection?

A. It refreshes my recollection, too; but the statement I made last time that I think it is the man, but I cannot positively say it is him. I am up here under oath.

Q. I am speaking of the statement of July 24th, 1951.

A. You will have to repeat it, because I don't remember it.

Q. All right. You read it again.

The Court: Let the witness read it.

Q. Yes, you read it again.

A. (Witness referring to statement). I see this, they left out "I think".

Q. They left out the words "I think"?

A. Absolutely, that is right.

Q. But you didn't have it in when you made the statement?

[fol. 58] A. I told you that, just what I am telling you now.

Q. What you are telling us here?

A. I told them I think they left it out, that is all. I said the same thing in the other trial.

Mr. Malech: No further questions.

By Mr. Mehler:

Q. Now, Mr. Galiardo, when you identified that photo,—I may have missed it, and I want to conform with the practice,—but did the State give you a group of photos and say, "Here is a list of all of the robbers just over 6 feet," or words to that effect?

A. I don't believe so.

Mr. Malech: I object to it. I have not been objecting; but that is certainly leading.

Mr. Mehler: I withdraw it.

The Court: That is all.

Mr. Mehler: Thank you, Mr. Galiardo. (Witness excused).

Mr. Mehler: Mr. Cascio.

PATSY CASCIO, called as a witness on behalf of the defendant, being first duly sworn, testifies as follows:

Direct Examination.

By Mr. Mehler:

Q. Mr. Cascio, where do you reside, sir?
A. 382 Walker Street, Fairview.
Q. And were you also in the tavern on this day?
[fol. 59] A. That is right.
Q. Where were you seated, sir?

The Court: Where what?
Mr. Mehler: Where was he seated.

A. Well, right at the—I should say at the center of the bar, watching television.
Q. What was on television?
A. Baseball.
Q. And did you see Mr. Yager come in?
A. Yes.
Q. Now, at any time that day, did you see the defendant Mr. Hoag?
A. I never did.

Mr. Mehler: Cross-examine.

---

Cross-examination.

By Mr. Malech:

Q. You say you were watching television there?
A. That is right.
Q. What time did this hold-up take place?
A. About 3, a little after 3.
A. 3 to 3:15, is that correct?
A. About that.
Q. And things happened pretty fast for you, didn't they?
A. That is right.
Q. And you didn't have a chance to see anybody?
A. I didn't have a chance.

Q. You didn't even know exactly how many men there were there?
A. Well, I will say maybe four or five.
Q. Yes. You didn't get a good chance to see anything?
A. No, I didn't.

[fol. 60] Mr. Malech: No further questions.

Redirect examination.

By Mr. Mehler:

Q. Just one thing, Mr. Cascio: You never met me before today?
A. I never did.

The Court: That is all, Mr. Cascio.
Mr. Malech: Thank you.

(Witness excused).

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Louis Capezzuto, called as a witness on behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination.

By Mr. Mehler:

Q. Mr. Capezzuto, where do you reside?
A. 320—9th Street, Fairview.
Q. Were you in Gay's Tavern on this occasion?
A. I was.
Q. September 20, 1950?
A. I was.
Q. And where were you seated?
A. I wasn't.
Q. Were you standing?
A. I came in after the holdup was all over.
Q. Oh, you came in after the hold-up was all over?
[fol. 61] A. Yes, sir.

Mr. Mehler: Well, I have nothing further.
The Court: How is that?
Mr. Mehler: He came in after the hold-up was over.

The Witness: They got me as I came in the door, but all the boys was in the back room, it was over.

By Mr. Mehler:

Q. Did you see these robbers?
A. Just the one fellow put the gun to my head.
Q. What did he look like?
A. Oh, I don't remember.
Q. Well, was it Mr. Hoag?
A. No, definitely not.
Q. Definitely not?
A. Right. He was shorter than me.

Mr. Mehler: Cross-examine.

Cross-examination.

By Mr. Malech:

Q. You say that when you walked in the door, you were held up immediately?
A. I was.
Q. Isn't it true that you were held up from behind?
A. Yes, I was, but——
Q. You didn't see the man?
A. I seen the fellow at the door. There was three of them in there, and the one fellow I did see was the fellow that put the gun to my head.
Q. You didn't see all three of them?
[fol. 62] A. No, because I come into the door.
Q. The one that put the gun to your head was shorter?
A. Shorter than me.
Q. What time did this hold-up occur?
A. About 3:30, and they were all tied, lying in the back room.
Q. Everybody was tied?
A. That is right.

Mr. Malech: That is all.
The Court: You say this man was shorter than you?
The Witness: Yes, sir.
The Court: All right.

(Witness excused).

[fol. 63] JOHN TERRANOVA, called as a witness on behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination.

By Mr. Mehler:

Q. Now, are you a member of the Fairview Police Department?

A. I am.

Q. And you were such a member on September the 20th of 1950?

A. I was.

Q. Now, did you get a subpoena to produce the original records of your department?

A. I did.

Q. And you did?

A. Yes, sir.

Q. And you produce them?

A. I produce them.

Q. Did your department take statements from four individuals?

A. We did.

Q. In the Gay's Tavern?

A. I don't know where they took them; but they took statements from the four men.

Q. Do you have copies of those statements?

A. I have.

Q. Where are the originals, sir?

A. The originals, I believe Captain Ackerman, that is Chief Ackerman now, turned them in to the Prosecutor's Office.

Mr. Mehler: Now, at this time, I request the Prosecutor's Office to produce them if they have them: if not, to consent to the copies of Yager, Galiardo, Cascio and Capezzuto.

[fol. 64] Mr. Malech: I don't see the purpose of this, if your Honor please. They are self-serving. I do not see that they are particularly material. You can call the witnesses and have them testify. They are here.

Mr. Mehler: These are State documents, sir.

The Court: That would not be the proper way to prove them, would it be, Counsel, through this man?

Q. Do you have copies of the typewritten statements with you?

A. Not the typewritten statements I haven't.

The Court: How can you prove them through him?

Mr. Malech: Even with the originals, sir, I think it is certainly objectionable, and I do object.

Q. Well, do you have the original record book there of September 20, 1950?

A. That I have.

Q. Would you please read the entry of September 20, 1950?

Mr. Malech: If the Court please, I object.

The Court: Do you want to ask him about it?

By Mr. Malech:

Q. What does this matter concern that you are about to read?

Mr. Malech: There hasn't been any ground work laid of what he is going to read.

The Court: What is it about?

[fol. 65] Q. About this period, do you have an entry?

A. I have an entry in the book as to an armed robbery of Gay's Tavern on 307 Bergen Boulevard, Fairview, New Jersey.

Mr. Mehler: Now, I request the officer to read from the record the entry so made on that date.

The Court: Well, who made it?

Q. Who made the entry?

A. Chief Ackerman. He was Captain Ackerman at the time. It is my understanding this came out of it. I was on the desk. I had a call from—a 'phone of the robbery. Chief Ackerman went out on the hold-up, and he entered it in the book; but I was at the desk when I had the 'phone call that the place was robbed.

Q. So that he is the one that made the entry?

A. Chief Ackerman is the one that made the entry in the book.

Mr. Mehler: In view of that, I will have to call the Chief tomorrow, sir.

The Court: Unless you can get together on it. Have you seen it?

Mr. Malech: Yes. I see no objection. I just didn't know what it was he was testifying to.

The Court: You haven't any objection to it being read?

Mr. Malech: I have no objection if the police officer [fol. 66] said he investigated this matter, and it is what he did. I am satisfied. Why don't you ask him what he did, and he can testify to it?

The Court: Just a minute. He has distinctly told us that the then Captain was the one who investigated the matter and wrote up the book; but this officer was on the desk at the time. The call came in concerning the hold-up. Is that right?

The Witness: Right.

The Court: And that is all you know about it?

The Witness: That is all I know, your Honor.

Mr. Mehler: In view of that, sir, I have seven policemen here this morning, and I thought I secured the right one; but apparently, I did not, and I apologize to this officer.

Mr. Malech: So we can save time, if this officer can testify that is the original record, I have no objection to a police record going into evidence.

Mr. Mehler: Just the reading of the entry, that is all.

Mr. Malech: Well, all should go into evidence.

Mr. Mehler: All right, good.

The Court: All right.

The Witness: September the 20th, time, 3:40 p. m. [fol. 67] Called up on armed robbery at Gay's Tavern at 307 Bergen Boulevard, Fairview, New Jersey, by four armed men who walked into the tavern and held up the owner, Charles Galiardo. One brought him from behind the bar, while another man went behind bar and took money from cash register amounting to $65.00 in bills and silver. They left in a Buick sedan, color maroon, New York Registration. Description of one man, 6 foot 2 inch in height, about 150 to 170 pounds, between the ages of 25 and 30, wore brown pants and sport jacket, open collared shirt, carried a small white revolver and wore glasses.

Second man, 5 feet 10 inches, black hair, between the age of 38 and 42, wore blue shirt, pointed nose, carried black pistol, make unknown.

Third man, all the same; wore a soft felt hat.

Fourth man unknown.

And then radio alarms that went out. Do you want that?

Q. No. Just the part that you read.

A. And then where he was turned over to the Prosecutor's Office, investigated by Chief Michael Orecchio, Bergen County Prosecutor's Office.

And Captain William Ackerman, Patrolman Ridgway, [fol. 68] Patrolman Bannon B-a-n-n-o-n, Patrolman Stepanik, Patrolman Muller, Patrolman Polifroni, and Officer Terranova at desk. That is all.

Mr. Mehler: That is all.

Cross-examination.

By Mr. Malech:

Q. When was the report made, sir?

A. Do you mean this report that we put in the book?

Q. Yes.

A. That I don't know. I went home at 5:15.

Q. On what day?

A. Oh, September the 20th.

Q. It was the day of the robbery?

A. The day of the robbery, that it occurred.

Mr. Malech: That is all.

Mr. Mehler: Now, I am going to call back Mr. Terranova to the statement, to the typed up statement, from these witnesses.

The Witness: Yes.

Redirect examination.

By Mr. Mehler:

Q. Do you have copies of typed statements?

The Court: He said no.

Mr. Mehler: I have read them. I think it is cross-examination.

A. Let me get this right, now. Oh, do you mean from the four men?

[fols. 69-70] Q. Yes.

A. I have some here.

Q. Who do you have?

A. Patsy Cascio, Yager's, Dottino, Galiardo, and Capezzuto.

Q. Now, they are copies. Right?

A. Supposed to be.

Q. The originals, if you know, where are they?

A. As far as I know from listening to the way that you—the Chief, Ackerman spoke,——

Q. Never mind. Do you know, yourself?

A. I do not know.

Mr. Mehler: That is all.

The Court: That is all.

(Witness excused).

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[fol. 71] William B. Ackerman, called as a witness on behalf of the defendant, being first duly sworn, testifies as follows:

Direct Examination.

By Mr. Mehler:

Q. You are the Chief of Police of the Borough of Fairview?

A. Yes, sir.

Q. And in the year 1950, were you on the police force?

A. Yes, sir.

Q. In what capacity?

A. Captain.

Q. Was this incident reported to you as such Captain of Police?

A. Yes, sir.

Q. And what did you do then?

[fol. 72] A. Why, I went up there with five or six men and investigated, and as a usual investigation, as to what happened.

The Court: Keep your voice up, Chief.

A. (Continuing) As to what happened and, in other words, made by usual investigation as the head of the department, investigation of the—and how many men came in there, and took statements of all the victims.

Q. And you have copies of those typewritten statements that were taken at that time?

A. Yes, sir.

Q. Were they taken from Mr. Galiardo?

A. Yes sir.

Q. Mr. Capezzuto?

A. Yes, sir.

Q. Mr. Cascio?

A. Yes, sir.

Q. Mr. Yager?

A. Yes, sir.

Q. And were copies made of those statements, Chief?

A. Yes, sir.

Q. Do you have those with you?

A. I have, sir.

Q. What happened to the originals?

A. Turned over to the Prosecutor's Office.

Mr. Mehler: Well now, I at this time, sir, ask that the Prosecutor's Office produce the original or consent to the introductions of the copies.

Mr. Malech: If the Court please, I certainly object because counsel well knows that he has no right to ask the Court to accept such testimony, testimony of the statements made by the defendant's own witnesses. They are [fol. 73] self-serving declarations. If he intends to use them, I certainly think it is improper.

The Court: Well, he certainly intends to use them or he wouldn't call for them.

Mr. Malech: It is improper to use them.

The Court: Certainly, it is improper. You have plain access to all the individuals that made them, Counsellor, and that is the best evidence, not a statement which was taken at a certain day. Can you not produce the originals? They have been in Court, haven't they?

Mr. Malech: Yes, sir, they were in Court, all those persons.

Mr. Mehler: That was just corroborative of what they testified to.

The Court: I will sustain the objection.

Mr. Mehler: Thank you, Chief.

The Court: Any questions? No.

(Witness excused).

Mr. Mehler: Mr. Hoag.

The Court: Be sworn.

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WILLIAM HOAG, the defendant, called as a witness in his own behalf, being first duly sworn, testifies as follows:

[fol. 74] The Witness: Your Honor, may I address the Court, please, before my attorney——

Mr. Mehler: I ask that the jury be excused, sir. The defendant wants to address the Court.

The Court: Yes, surely.

Mr. Mehler: I think it perfectly proper.

The Court: All right. Will the jury retire, please.

(The jury retired at 10:20 o'clock a. m.)

Mr. Mehler: Sir, I requested the jury to be excused, and Mr. Hoag, apparently, wants to address some remarks to the Court. What those remarks are I do not know. I have spoken to Mr. Hoag. I have told him what I wanted from or what I was going to ask him. Mr. Hoag, I think, believes that he wants to go further into the matter. I don't know what your Honor's ruling is going to be. I told him he had a perfect right to ask your Honor, but I didn't think it should be in the presence of the jury.

The Court: Most unusual. I have never had it done before. You are his attorney, and the Court, of course, usually talks to the defendant through the attorney.

Mr. Mehler: That is true, sir.

The Court: However, I will hear him.

[fol. 75] Mr. Mehler: Thank you.

The Witness: Your Honor, I would like to say that in May 27th, 1952, four men, the same witnesses, Mr. Yager and four other men who was in the Court here and testified at this trial here, gave the same testimony in 1952 on May 27th.

As a result of the testimony, I was acquitted of this very same case I am being tried on, and my opinion is former jeopardy, as I am being put in jeopardy.

Further, I would like to say that I have not—I have learned that I have been illegally returned, as I am not a fugitive from justice from the State of New York.

Now, I would like to say there was evidence at the last trial that the Prosecutor's Office, of which I have learned also further upon my acquittal on May 27th, I believe it was the Prosecutor's right to try me on this case then, by denying me the right to a speedy trial, which I understand is the law, and I was in a case to that effect, and that they mentioned, by denying me the right to a speedy trial, that I was injured.

At that time, two of my witnesses are now dead. I am being placed in former jeopardy, and I wanted to say that [fol. 76] to the Court, and that they understood the case, and I feel this case certainly constitutes a double jeopardy.

And so I would like to go further. I asked that a $10,000.00 bail that had been set up on me be reduced on numerous occasions, which was denied.

As a result of that, I then had a motion for dismissal on the former jeopardy, and it was denied.

Now, I would like to say that I appeal to the Court, in view of the fact they wouldn't lower my bail, I appealed to the Court to appoint me a counsellor in order to appeal things which we could maybe get into on the trial, which would put me in position to stand trial, and I would, it may be, stand trial on the same case I was not guilty on, on which the Court denied me the right to a counsellor.

And at this time I would like to say I am being put on trial under duress, and I thank the Court for hearing me.

The Court: Will you bring in the jury.

(The jury returns and is polled by the Clerk).

The Court: All right, sir.

Direct Examination:

By Mr. Mehler:

Q. Mr. Hoag, you are the defendant in this case?
[fol. 77] A. Yes, sir.

Q. You are accused of having participated in the crime of robbery on September the 20th, 1950 in the Borough of Fairview, County of Bergen?

A. Yes, sir. And I was acquitted on that very same——

The Court: Strike the answer, and answer the question.

The Witness: I am sorry.

The Court: Now, you are just here to answer the questions that are put to you by the counsel who has been appointed at your request to represent you.

The Witness: I am sorry, your Honor.

The Court: Now, you will answer the questions or else you will have to be dealt with otherwise.

The Witness: Yes, sir.

The Court: Do you understand?

The Witness: Yes, sir.

The Court: As long as you understand it, proceed.

Q. You understand what you are charged with here?

A. Yes, sir.

The Court: I wonder if he does. Do you understand that you are being charged with wilfully, feloniously and forcibly taking from the person of one Elmer S. Yager,——

[fol. 78] The Witness: Yes, sir.

The Court: —certain personal goods and chattels, to wit, one wallet and one wrist watch of the value of $50.00 in lawful money of the United States of America, the goods and chattels of Elmer S. Yager by putting him, Elmer S. Yager, in fear, in violation of the statute. Do you understand that charge?

The Witness: Yes, sir.

The Court: Do you further understand that you are also charged on that day, September 20th in this County, in the Borough of Fairview, with willfully and unlawfully carrying in and about your clothes on your person two automatic pistols in violation of the statute? Do you understand that?

The Witness: Yes, sir.

The Court: All right. I think that ought to be made plain to him, what he is charged with, and that it isn't anybody but Elmer S. Yager. All right.

Q. Mr. Hoag, were you in Fairview on September the 20th, 1950?

A. I was not.

Q. Had you ever been in Fairview?

A. I was never over in New Jersey at all and did a crime here.

Q. Now, you have been convicted of crime?

[fol. 79] A. Yes, sir.

Q. And you have been incarcerated in the State Penitentiary?

A. Yes, sir.

Q. Do you know any of the parties that testified here yesterday?

A. No, sir.

Q. When was the first time you ever saw Mr. Yager?

A. The first time I had ever seen Mr. Yager was in the police line-up in New York County jail in November of 19—November—November—or December, 1951.

Q. When was the next time you saw him?

A. The next time I saw Mr. Yager was at the trial over here, 1952.

Q. And the next time?

A. The next time I seen Mr. Yager was when Mr. Yager come up to Cayuga County in Auburn, New York, when I was released from prison, and he testified against me and had me returned here.

Q. And the next time you saw him?

A. And the next time I seen Mr. Yager, I would say——

Q. No. Just answer my question.

A. —was when he rode down here to Bergen County jail in the same car.

And then the next time——

The Court: Well, when?

The Witness: That was on—

The Court: The word was "When"?

Q. Was that in May of this year?

A. May 28th of 1954, yes, sir.

[fol. 80] The Court: May 28th?

The Witness: 1954.

The Court: 1954.

Q. And the next time?

A. And the next time is at the trial here yesterday.

Q. Now, do you remember September the 20th, 1950?

A. Fortunately enough, I do, yes, sir.

Q. Where were you on that day?

A. I was in New York City in the midtown section of Manhattan. I was with my——

Q. All right. I will ask you that, Mr. Hoag, if you do not mind. Whom were you with?

A. I was with my mother-in-law, my wife June, the sister-in-law, Virginia, was there, my two brother-in-laws was there. There was a woman and a daughter who lives next door, they come in.

The Court: Just a minute. Not so fast. "I was with my mother-in-law." Who else?

The Witness: My mother-in-law, my wife June and——

The Court: Your wife, June?

The Witness: June.

The Court: J-u-n-e?

The Witness: Yes, my wife June, my sister-in-law Virginia, my two brother-in-laws.

The Court: Yes.

[fol. 81] The Witness: There was a woman next door who came in with her daughter that lives right next door to my house. They were there.

The Court: Ask your next.

The Witness: And that was all the people I seen at the house at that time.

Q. Is your wife available today?

A. As a result of seeing me arrested on charges she knows I have been acquitted; she is in a mental institution.

The Court: Stricken.

Q. Is your wife available today?

A. No, sir. My wife is in a mental institution for four years now from seeing me arrested.

Q. Is your mother-in-law available today?

A. My mother-in-law, is she? No.

Q. Is your sister-in-law available?

A. My sister-in-law is not available.

Q. Are your brothers-in-law available?

A. One of my brother-in-laws is in the Veteran's Hospital at the present time, and I don't know where the other

brother-in-law is. I understand the home was broken up at the mother-in-law's death.

Q. Do you know where this woman is now?

A. No, sir.

Mr. Mehler: Cross-examine.

[fol. 82] Cross-Examination.

By Mr. Malech:

Q. Mr. Yager, do you know where you were on September 25, 1950?

A. Mr. Hoag.

Q. What is that?

A. Mr. Hoag.

Q. Do you know where you were on September 25, 1950?

A. Yes, sir. As I mentioned before, fortunately enough, I do, yes, sir.

Q. As of September 25th, I am speaking.

A. On September 25th?

Q. Five days after this robbery.

A. If you allow me a moment, please?

Q. Sure.

A. Yes, sir. I had absconded my parole in New York.

Q. What is that?

A. I had absconded my parole in New York.

Q. You had absconded your parole in New York?

A. In New York City, yes, sir.

Q. Where were you living at that time?

A. At that time, I was living in 69 West 71st Street in New York City. I had just been released.

Q. What was the address?

A. 69 West 71st Street, New York City.

Q. And you know that some one was looking for you from the Prosecutor's Office at that time, did you not, sir?

A. I couldn't answer that by yes or no. I have to ex-[fol. 83] plain, if I may. I will be glad to explain. I cannot answer it.

Q. Suppose you tell us.

A. All right. I will have to go into a little detail on it, if you don't mind.

Q. I don't know what you are going to say.

The Court: One at a time, gentlemen. Let us get the record straight.

Q. Suppose you tell us.

A. There was circumstances leading up. As a result of it, I will have to go into detail.

The Court: Tell us where, whether you know where you were on September 25, 1951.

Mr. Malech: 1950, sir.

The Witness: 1950? Yes, sir. I had absconded my parole, and I was in New York City.

And what was that other question?

The Court: Where were you——

The Witness: Why,——

The Court: —in New York City? Where were you in New York City on September 25th?

The Witness: I was in Brooklyn, sir, and I was in the east side of Manhattan; the east side of Manhattan and Brooklyn at that time, yes, sir.

Q. Do you know that your premises was under surveillance at that time?

[fol. 84] A. Could I explain and go into detail?

The Court: No. Just answer the question.

The Witness: I have to explain it, sir.

Q. You can either answer yes or no, sir.

The Court: Certainly he can answer.

A. Well, the answer is no.

The Court: No.

The Witness: I am under oath and I tell the truth; but I would like to explain it, if I may.

The Court: You will have an opportunity through your attorney.

Q. Now, that was five days after this robbery. Right? The 25th?

A. When I learned of this robbery I am accused of on September 20, 1950, I imagine that would be five days after, yes, sir.

Q. Do you remember what you did on the 25th?

A. Yes, sir.

Q. Suppose you tell us what you did that day.

A. Well, I cannot remember everything; but I can remember vaguely what I had done. I went to a friend of mine in Brooklyn.

Q. Do you know what day of the week the 25th is?

A. It must have been a Monday or Thursday. I am not certain.

Q. You are not certain?

A. No, sir.

[fol. 85] Q. What day was the 20th?

A. I remember the 20th was on a Wednesday. I remember that.

Q. You remember that, and you remember the 25th. Is that correct?

A. I am just calculating through my mind.

Q. Do you remember September 20th better than you remember September 25th?

A. Well, not necessarily; but there was something that happened on September 20th. If you would allow me to explain, I could tell you, and it would be truthful.

Q. You remember September 20th——

A. Yes.

Q. —better than September 25th? Yes or no, do you?

A. Yes, I would say so.

Q. You remember that better. Is that correct?

A. Right.

Q. And you remember September 20th better than September 26th of 1950?

A. Well, I don't know if it was the 26th or 27th; but something unusual happened on the 26th, and that I can remember, too.

Q. Do you remember the 26th, too, and something unusual happened on September 20th?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Now, on September 20th, did you have a gun——

A. No, sir.

Q. —that day? Did you ever own a gun?

A. No, sir.

[fol. 86] Q. You never owned a gun?

A. No, sir.

Q. Did you ever have possession of a gun?

A. Well, I had never owned a gun; but I had handled one. One was shown to me at one time, but it was returned.

Q. Did you ever use a gun?

A. No, sir.

Q. Did you ever use it at all?

A. No, sir. Well,——

Mr. Mehler: What do you mean by "use"? Do you mean shoot?

Mr. Malech: I was just asking him whether he ever used a gun.

The Witness: I was in the Army.

The Court: I think that is correct, Mr. Prosecutor.

Q. Were you ever in possession of a gun?

A. Well, a very short time, yes, sir.

Q. A short time?

A. Yes, sir.

Q. Mr. Hoag, were you ever convicted of a crime?

A. Yes, sir, I was.

Q. When and where?

A. I was convicted of the crime of attempted robbery in 1948. I was guilty of that crime, and I pleaded guilty to it.

Q. And where was this?

A. This was in Brooklyn, New York, in Kings County.

Q. And when were you convicted of this crime?

A. I just told you it was in March of 1948, I believe. I [fol. 87] am not certain. I think it was. Yet, it was in March of 1948.

Q. And what was the crime?

A. Attempted robbery.

Q. Were you ever convicted of any other crime?

A. Yes, sir. When I was a child, and I was sentenced to a reformatory.

Q. What was the crime for?

A. Illegal entry.

Q. Now, on this particular day, can you tell us, if you know, where you were in the afternoon of September 20, 1950?

A. In the afternoon of September 20, 1950, I was in my mother-in-law's in 48th Street, between 9 and 10—that is 9th and 10th Avenue in the downtown section of Manhattan.

Q. What time did you get there in the afternoon?

A. I was there from 11 o'clock in the morning till about 7 o'clock, when we left with my brother and with my sister-in-law's husband to Long Island. That is about 6:30.

Q. From 11 in the morning until 7 p. m. in the evening?

A. 11 or 12, I am not sure of the hour, until about 7 p. m., yes, sir.

Q. So that at 3 and 3:30, 3:15, you definitely were not in New Jersey?

A. I was not, yes, sir.

Q. Now, who was there with you in your mother-in-law's house?

A. In my mother-in-law's house, as I said before, my [fol. 88] mother-in-law's house, my mother-in-law was there, my wife June, my sister-in-law, Virginia, my two brother-in-laws and myself.

The Court: You say the two sisters-in-law were there?

The Witness: No. My one sister-in-law.

The Court: Just one?

The Witness: Yes, sir.

The Court: But two brothers-in-law?

The Witness: Two brother-in-laws, yes, sir.

Q. Now, you say that your mother-in-law died?

A. My mother-in-law died about seven months.

Q. And your wife is not available?

A. My wife is in the Manhattan State Hospital.

Q. And your sister-in-law, where is she?

A. She is unavailable.

Q. She is unavailable?

A. Yes, sir.

Q. Did you try to get in touch with her?

A. Yes, sir. And it would have been news to me, especially the point I would like to bring out, why she is unavailable.

Q. Now, what are the names of your two brothers-in-law who were there?

A. George and Albert.

Q. What is the last name?

A. Gaeger.

Q. Gaeger. Albert?

A. Albert Goeger and George Gaeger.

Q. Where is George Gaeger?

A. George Gaeger, I have learned is in the Veteran's [fol. 89] Hospital.

Q. Where is Albert Gaeger?

A. Albert Gaeger, I don't know where he is. I understand the family broke up.

Q. Now, in addition to the persons whom you have mentioned, you say that there was another woman in the house. Who was that?

A. There was several women in there, sir.

Q. Do you know the names of any of them?

A. No. I believe it is—no, I don't.

Q. Have you made any attempt——

A. Yes, I did.

Q. —to contact them?

A. They might be—I am not certain.

Q. Do you have any of those here in Court?

A. No, sir. I know the names.

Q. Do you have anybody here?

A. No, sir. Like I said before, my two witnesses are dead after such a length of time.

Q. Well now, didn't you also mention, Mr. Hoag, that there were some other men who could testify as an alibi witness for you?

A. I said, sir,—you asked me only about the house. I was told just to answer questions. I didn't mention those men until you mentioned them.

Q. Are they here in Court?

A. No, sir.

Q. Now, when you saw Mr. Yager the first time in the line-up, did you recognize him?

[fol. 90] A. I never seen Mr. Yager before in my life, and that is the God's honest truth.

The Court: Then the answer is no.

Q. You didn't recognize him?

A. No, sir.

Q. But you did recognize him, you say, the second time you saw him?

A. Mr. Yager, whom I know now, but Mr. Yager rode over in the car the first time, as well as the second time, when I was being brought to the Bergen County jail.

Q. When you saw him the second time, you recognized him, didn't you?

A. Well, do you mean——

Q. You testified that you saw him first at a certain place. Where was that?

A. That was in the line-up in New York.

Q. And then you saw him again?

A. Yes, sir.

Q. And you recognized him? And that was at the trial?

A. Well, it was the man who came over in the car with me.

Q. You recognized him as the man who identified you?

A. Well, I would say so, yes, that is true.

Q. And do you recall how many men were in the line-up?

A. Yes, sir.

Q. With you. Will you tell the jury?

A. Yes, sir.

Q. What occurred?

A. There was ten men in the line-up with me, and I [fol. 91] might say I don't think it would be wise to say so.

Q. Do you recall what Mr. Yager did when he saw you?

A. I remember this man whom I know now to be Mr. Yager, came down the line of men, and I was situated somewhere in the middle, and this man, Mr. Yager, walked down the line and he walked—he walked past me, and then, all of a sudden, I felt a tap on my shoulder, and that is the truth of the matter.

Q. Did he tap anybody else?

A. No, sir.

Q. Who tapped you?

A. Well, I felt a tap on my shoulder. It must have been Mr. Yager.

Q. Do you know whether any one else was tapped?

A. No, I don't think so.

Q. You were the only one?

A. No. I was the only one, yes, sir.

Q. Have you ever been over to New Jersey before?

A. Just when I was going to Camp Dix and Camp Kilmer, yes, sir.

Q. You testified a few minutes ago you had never been in New Jersey?

A. Yes, sir.

Q. You would revise that statement that you made in haste?

A. I don't revise it.

Q. What is that?

A. I don't revise it. I says I never been in New Jersey, [fol. 92] let alone commit a crime here; but I was in New Jersey when I was in Camp Dix and Camp Kilmer; but all I done was went back and forth to New York at that time. But I am not familiar——

Q. The answer is you were never in New Jersey except for two occasions. Is that right?

A. Yes, sir. Well, no: I passed through New Jersey on the train many times on the Pennsylvania Railroad. I passed through, coming from Chanute Field, Illinois.

Q. You have been in New Jersey quite often, as a matter of fact?

A. Passed through New Jersey.

Q. Have you ever been in Fairview?

A. No, sir.

Q. How long have you lived in New York City?

A. I have lived in New York City,—I was born in Brooklyn.

Q. You never came over to New Jersey?

A. No, sir. That is the truth, outside of what I have said.

Q. And you never left New York City?

A. Personally, to be honest with you, to tell you the truth, I never knew New Jersey existed, because everything —I lived in New York City, and everything I made was in New York.

Q. It was in New York City, is that right?

A. Yes.

Q. Were you ever outside of New York City beside these trips——

A. Yes, sir.

Q. —through New Jersey?

A. Yes, sir.

Q. So you have been in New Jersey?

A. I passed through New Jersey.

[fol. 93] Q. That was one place you stayed away from?

A. I passed through New Jersey. I know nobody over here, and I don't know of anything over here, and I have no business being over here, and I would like to say I don't belong in this courtroom today because I was never over in New Jersey, let alone committing crime here.

Q. Now, on September 20th, would you tell us what you did after you left the house of your mother-in-law?

A. Well, I left the house of my mother-in-law on two occasions, on two occasions during that afternoon.

Q. You left the house on two occasions?

A. Yes, sir.

Q. What time?

A. I left the house, I have every reason to believe it was between 2 and 2:30. I cannot say the exact time I did. That was the first time I left my mother-in-law's house.

Q. Do you know how long it takes to get from your mother-in-law's house to the Washington Bridge?

A. No, sir.

Q. You have never been over the Washington Bridge?

A. When I was a Boy Scout, yes, sir, I think so. I am not certain, but——

Q. Do you know where the Washington Bridge is?

A. Yes, I believe so. Yes, I do.

Q. What is that?

A. I think so, yes.

Q. You think so?

A. Yes.

[fol. 94] Q. Do you mean you never saw it?

A. I know where it is, yes.

Q. You have been over it, and you know how long it takes to get from your mother-in-law's house to the Washington Bridge?

A. No.

Mr. Mehler: Let us establish by what method of travel.

The Court: Well, I suppose he can answer it if he wants to, if he knows. If he doesn't know, he san say so.

Mr. Mehler: If he knows.

The Court: Yes, if he doesn't know, he can say so.

The question is, do you know how long it would take you to go from your mother-in-law's house, as I understand, on 48th Street, to the George Washington Bridge?

The Witness: To where?

Q. From your mother-in-law's house——

A. To the George Washington Bridge?

Q. Yes. If you know. If you don't know, say so.

A. I would say about an hour.

Q. By what means would you say it would take an hour, or have you ever gone——

A. My mother told me, when she visited me, it took about [fol. 95] an hour to get here. She says she took a bus or something over here.

Q. Over where?

A. Over to New Jersey.

Q. You have talked to her about coming to New Jersey?

A. No. I asked my mother, I said, "Who brought you over?"

So she has a heart condition, and I told her I didn't want her traveling by herself, and she took a subway up to where the New York Washington Bridge is, and how she had come over by bus, and I told her not to come here any more.

Q. Who did she come over to visit?

A. By herself, and that is why I told her not to come.

Q. Who did she come over to visit?

A. To me.

Q. To New Jersey?

A. Over here.

Q. You mean in the jail?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. So that, actually, she never came by car. She came by subway?

A. She told me by subway, yes.

Q. What is that?

A. She told me by subway.

Q. Now, after you left your mother-in-law's that day, what did you do?

A. After I left my mother-in-law's, I went down to the Dairy Lea Milk Company on 12th Avenue and West 48th Street.

Q. Well, you say you left in the afternoon and you went down to this Dairy Lea place?

A. Yes, sir.

Q. What time in the afternoon?

A. I cannot say to be certain; but I would say it would [fol. 96] be between 2 and 2:30, 2 and 2:30 in the afternoon.

Q. Between 2 and 2:30 in the afternoon?
A. Yes.
Q. Where is this Dairy Lea place?
A. On West 48th Street and 12th Avenue.
Q. West 48th Street?
A. Yes, it is right on the corner.
Q. And 12th Avenue. And what was the purpose of your going to the Dairy Lea place?
A. To see a friend of mine.
Q. Did you see him?
A. Yes, sir.
Q. What was the reason for your going there?
A. I wanted to borrow some money until I got my check.
Q. You wanted to borrow some money?
A. Yes, sir. My check, I was supposed to be paid next——
Q. When you got there, who did you see?
A. I seen a Mr. Nick Prosk.

The Court: Nick Trost?
The Witness: Capital P-r-o-s-k, your Honor, and another fellow.

Q. And that was between 2 and 2:30?
A. Yes, sir.
Q. Right?
A. On second thought, I would say it would be around 2:30.
Q. A little later?
A. Yes, sir.
Q. It might have been 12:30 to 3?
[fol. 97] A. No, sir. I am telling the truth up here.
Q. Yes. Between 2 and 2:30?
A. It was between 2 and 2:30.
Q. At that time you were in the Dairy Lea——
A. Milk——
Q. —Milk Company?
A. Yes, sir.
Q. Which is at 48th Street and 12th Avenue?
A. Yes, sir.
Q. Who else did you see?
A. I seen another fellow by the name of Wash.
Q. Wash. How do you spell it, do you know?

A. Well, W-a-s-h.

Q. Where did you see him?

A. He works there with this friend of mine.

Q. And how long had you known him?

A. I had known him for several years.

Q. As a matter of fact, you were very friendly with him, weren't you?

A. Yes, sir, I knew him.

Q. And you went down there that day and you wanted to borrow some money?

A. Yes, sir.

Q. And did you borrow any money from him?

A. The man told me all he could let me have was a dollar or two. I believe it was $2.00, I am not certain, until I got my check the next day.

Q. Because you had no money that day whatsoever?

A. No. I had been dismissed from my job, because——

[fol. 98] Q. Did you have any money that day before you borrowed the $2.00?

A. No. My wife had money, gave it back to me, but I don't know what it was.

Q. And did you go to anybody else when you could only get $2.00 from Mr. Prosk that day?

A. When I seen Mr. Prosk, I was asking him about getting a job down there, and he told me to go see the boss. So I went and saw the boss.

Q. When was that?

A. At that time.

Q. What was his name?

A. I don't know what his name was.

Q. He was the boss of the Dairy Lea?

A. Yes, he was in the office.

Q. So you probably saw him between 2 and 2:30, and this all happened in that half hour, do you think?

A. In the Dairy Lea, yes.

Q. You went and saw Mr. Prosk and you asked him for the loan of money, and you chatted with him for a while?

A. Yes.

Q. And at that time you asked him if there was a chance of getting a job?

A. Yes.

Q. And he said, "Well, you might go in and see the boss"?

A. Yes.

Q. And you went in and saw the boss on that day at that particular time?

A. Yes, sir.

[fol. 99] Q. And while you were there, you also spoke to Mr. Wash?

A. Yes.

Q. And you knew Mr. Wash and you knew Mr. Prosk very well?

A. Yes, sir.

Q. Now, are they in Court here today?

A. No, sir.

Q. Did you try to get in touch with them?

A. Yes, sir. At the last trial, I told the man——

Q. I asked you, did you try to get in touch with them?

A. Yes, sir.

Q. Do you know why they are not here in Court? Do you know?

A. No, sir.

Q. You do not know why?

A. No, sir.

Q. And they are the only persons, Nick Prosk and Mr. Wash and the boss of Dairy Lea, who can state where you were at 2:30?

A. Yes, sir.

Q. And you remember that day, September 20, 1950, very well, don't you?

A. I certainly do.

Q. And so, if there were any other persons who knew where you were around 3 o'clock, you would remember that, wouldn't you?

A. Yes, sir. And I do remember other persons, too, but the people said it is so long ago, they don't remember.

Q. Well now, as a matter of fact, didn't you have some one speak to them a couple of years ago about this?

A. Yes, sir, and they had been over here twice to testify [fol. 100] for me at that time at the trial, and they have had the opportunities. We couldn't let them take any more back talk.

Q. That is the only reason now, because they couldn't come back to come to your trial?

A. No. They did come over. That is what I am talking about.

Q. I am asking you about today. Why didn't you bring them in today?

Mr. Mehler: Now, I object.

Mr. Malech: I have a right to ask him.

The Court: All right.

A. I don't know, sir.

Q. Did you make any attempt to bring them over here?

A. Yes, sir, and there was an attempt made to bring them over here.

Q. Now, as a matter of fact, Nick Prosk wasn't with you bewteen 2 and 2:30. Isn't that so?

A. As a matter of fact, he was, sir, because I was in the Dairy Lea Milk Company.

Q. You were there in the morning, weren't you?

A. I was there between 2 and 2:30 on that day, September 20, 1950.

Q. So that the only persons who know where you were at about 2:30 are Nick Prosk, who is not here. Is that correct?

A. No, there was the boss there.

[fol. 101] Q. The boss?

A. The man——

Q. And Mr. Wash, right? Nick Prosk, Mr. Wash and the boss of Dairy Lea?

A. Yes. And there was a lot of other people too; but it is so long ago, they says they cannot——

Q. There were a lot of people there?

A. Yes.

Q. They can testify as to where you were?

A. That is what I cannot understand, all this.

Q. You said you remembered September 20th very well?

A. I do; but it is four years ago, with these other people.

Q. You knew you were charged with this offense a few years ago, don't you?

A. Yes, sir. And as I said before,——

Q. You had plenty of time to think about it, hadn't you?

A. I come up here and I told the truth on my last case and pleaded guilty, I would still be here, and I am innocent.

The Court: One at a time, Counsellor.
(To the witness) Wait until he finishes.
All right.

Q. You had plenty of time to think of that day?

A. Sir, I was out on parole four months within the last seven months out on the street every day, and if I can remember or associate something with them for the first eight years I am out now, is four months, and I could come [fol. 102] down to it, if you could tolerate it, I could account for every day of those four months as chronologically as these men hasn't.

Q. And on this particular day you can account for it very well?

A. I certainly can, and if you will——

Q. And you say that these three men, the boss of the Dairy Lea, Nick Prosk and Mr. Wash can say where you were at 2:30?

A. Yes, sir.

Q. They could if they were here. Right?

A. Yes, sir.

Q. But, as far as you know, you have made no attempt to get them here today?

A. Sir, I have three attorneys who is handling the case for me, and they—what they do is for my best interests, and I have nothing to do in the decision. My case rests——

Q. Now, after you left your mother-in-law's at 7 o'clock, where did you go?

A. We went to my brother-in-law's—not my brother-in-law's,—house; my sister-in-law's husband in Woodside, Long Island.

Q. Who went with you?

A. My wife June,—my wife June, my brother-in-law, the two—the baby, they left the baby carriage in the house, I remember, the baby. We all went over by cab.

Q. When did you next come home?

A. I next went home at about 2:30 that morning.

[fol. 103] Q. And how long did you live at home after that day?

A. Well, the next day, I believe it was, or the day after that, I reported to my parole officer on Center Street, and I told him that I had been dismissed because I was one of the last men hired on the job, and that there was an

efficiency expert around and, in view of the fact that I had been one of the last men hired, they let me go.

Q. Don't you know, Mr. Hoag, that your apartment was under surveillance about that time?

A. No, sir, at that time, I didn't know.

Q. Well, were you present in your home for the next several days?

A. No, sir. I went to my brother-in-law's the next day.

Q. Were you present in your home for the next several days? You said you had?

A. Well, yes, I did. Yes, my wife and I slept up there one night. Yes, that is true.

Q. What night?

A. Yes, because it was the next day.

Q. Where did your wife go after that, after that night?

A. Well, after we left the house,—it is so long ago—so, after we left the house, we went down to my parole officer. She was having a child at the time and, in several years, I never seen my child.

[fol. 104] Mr. Malech: Now, if your Honor please, I move that that be stricken.

The Court: That will be stricken.

The Witness: My wife and I went down, I had to report to the parole officer on that day; so we went down to the parole officer, and I reported to the parole officer, and I told him I lost my job, I had been dismissed because I was one of the last men hired.

So he asked me, he said, "Was anybody at your house?"

So I said, "no."

So he says, —he asked me something else, I cannot think; it was a few questions he asked me, I cannot remember off-hand what they were but——

Q. Well, after that one night, where did you go to sleep?

A. Well, in order to explain that, I have to give you this.

Q. After the one night, where did you go to sleep?

A. I slept in a friend's home.

Q. In a friend's home?

A. Yes, sir.

Q. And you stayed there for several nights?

A. I had absconded my parole, and I could explain, if you would only let me.

Mr. Malech: No further questions.

[fol. 105] Re-direct Examination.

By Mr. Mehler:

Q. Did you ever wear glasses, Mr. Hoag?

A. No, sir. I have 20-20 eyesight.

Q. Did anything particular happen at that house? Do you remember September 20th very well?

A. Yes, sir.

Q. What happened?

A. In order to explain——

Q. What happened?

A. My sister-in-law came in with a baby from Woodside, Long Island, and she come in with a black eye that was—it was unsocketed, you might say it is hanging off her face, which her husband had given her.

Q. You remember it was the same day?

A. Yes, sir.

Q. Now, Mr. Prosk and Mr. Wojack, were they in court here yesterday?

A. Yes, sir.

Q. This sister-in-law was there. You also requested your attorney to contact her, did you not?

A. Yes, sir.

Q. And they have reported to you as to their efforts?

A. Yes, sir.

Q. You say you absconded from parole?

A. Yes, sir, for what I believe was a legitimate reason.

Q. Now, just a minute. We are not going into that. On September the 21st, 1950, the day after this alleged robbery by you, did you report to the parole officer in New York City?

A. I believe it was the 22nd that I reported.

[fol. 106] Q. The 22nd?

A. That I reported to the parole officer. I think I picked up my check on the 22nd, yes, sir.

Q. You wouldn't pick it up from him, would you?

A. No, from my work.

Q. And did you then go to the parole officer?

A. It was the next day, I am pretty sure.
Q. The next day?
A. Yes, sir.
Q. And you told him that you had lost your job?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.
Q. Now, on this absconding from parole, when was that?
A. I believe that was on September 23rd or 24th of 1950.
Q. Would you like to tell us about that?
A. I certainly would.

Mr. Malech: If your Honor please, I respectfully ask counsel ask a question.
The Court: Yes.

Q. Why did you abscond from parole?
A. I absconded from parole because, when I was released on parole, I went down to the docks to a fellow I know, down to Pier 80.
Q. Don't go so fast. The jury cannot hear you too well.
A. When I was released from parole, from Auburn [fol. 107] Prison, I went down to the docks to a fellow that I know on Pier 88, and another fellow on Pier 92, and I told him that I come out of prison and I haven't got nothing, and I would like to get on my feet and establish myself in a home for my wife and I. So he asked me that—he told me.
Mr. Malech: I object to what the witness told him.
The Court: Counsel objects to a conversation.
Mr. Mehler: Oh, I see.

Q. Well, what did you do?
A. I was denied by my parole officer to drive a truck in the trucking company. I was denied by my parole officer to go over-seas for a pipe line job with another witness, another friend of mine and, when I learned that—when I learned that I was charged with robbery from New Jersey, on top of everything else that I went through, I just, I guess you call it, blew my top and just got out disgusted, and I never reported for parole again. And then I was arrested on November 20, 1950.
Q. Now, you testified here in this Court in 1952?
A. Yes, sir.

Mr. Malech: You said——
The Court: Is that all?
Mr. Mehler: That is all for me, sir.

[fol. 108] Re-Cross-Examination.

By Mr. Malech:

Q. You said, about that time, you blew your top, you were disgusted. Right?
A. Yes, sir.
Q. And when you went in to see Nick Prosk, you were out of a job then, weren't you?
A. Yes, sir, at that time, I was.
Q. In fact, you told him you had no money?
A. I asked him to borrow money until I could get my check the next day.
Q. You had no money then?
A. There was a week's salary coming to me the next day.
Q. You expected to get some money? You expected to get some money?
A. Yes, my check the next day.
Q. You had no money that day. Is that right?
A. I believe my wife had money.
Q. What is that?
A. I believe my wife had money.
Q. Why did you go to borrow money from him?
A. Well, that was my own—I have a rule I never ask my wife, you know, and all I wanted was a couple of dollars for myself. That is all it was, and I would—I never asked my wife for anything.
Q. Why did you say your wife had money?
A. Well, I mean she didn't have an enormous amount of money. She might have had a dollar or two in her pocket book that was for food or something until we come to the next day.
[fol. 109] Q. She had a dollar or two, and you had nothing?
A. That is right.
Q. So you went to your friend, Nick Prosk?
A. Yes, sir.
Q. And your friend, Mr. Wash?
A. Yes, sir.

Q. And they were your friends, weren't they?

A. They certainly were.

Q. They still are your friends?

A. Yes, sir.

Q. And they are good friends of yours?

A. I would say so, yes, sir.

Q. And, being very good friends of yours, you asked them for some money?

A. Yes, sir.

Q. And one of them gave you a dollar or $2.00?

A. They are only working people like myself. That is all they can give me.

Q. And that was all the money you could borrow?

A. Yes, sir, until I got my check the next day. That is all I wanted.

Q. And you were pretty well discouraged at that time, weren't you?

A. I wasn't discouraged, because I had already seen another man who is dead now who, if he was here today to testify, could give evidence to the effect that he seen me on this day.

Q. Let us ask you about this other man.

A. Yes.

Q. Do you know what his name is?

[fol. 110] A. Mr. Owen Kelly, and he was the president of a certain union in New York City.

Q. And he also saw you?

A. Yes, sir.

Q. He also saw you at this time that you are accused of being in New Jersey?

A. Yes, sir.

Q. And you say he is the boss over here?

A. He was the president of this certain union at that time.

Q. President?

A. Yes, sir. It is just a title in the union.

Q. Well, your opinion is he is a substantial man?

A. Well, no. You see, they change their people. I believe it is a different election. It is a number of men, and he was selected as a president.

Q. Did you make any attempt to get in touch with him?

A. Yes, sir, and I have learned that he committed suicide.

Q. Anybody else, now, that you say could have substantiated your alibi?

A. There is a lot of people.

Q. A lot more?

A. There certainly are.

Q. Let us see if we cannot find out who they are. Who else is there that could establish this alibi if they would be here?

A. There was a woman and her daughter who lived next door to my mother-in-law, and they were in my mother-in-law's house at that time. The young girl she had, she was just engaged.

[fol. 111] Q. Did you contact your mother-in-law to get their names?

A. My mother-in-law is dead, has since died.

Q. She has since died. Now, you had an opportunity to contact her for two or three years?

A. Yes, sir, there was a contact made.

Q. Did you take the trouble to ask her who these people were?

A. Yes, sir. And my mother-in-law was terribly sick because of the result of seeing my wife in an insane asylum.

Q. Didn't you get the names from her?

A. I have been incarcerated now for about four years.

Q. She came to visit you? You said she came over here?

A. I said my mother. I didn't say my mother-in-law.

Q. Your mother-in-law never came. I am sorry. I thought your mother-in-law had come to visit you here.

A. No, my mother.

Q. Well, you never attempted, then, to get the names of these persons from your mother-in-law?

A. I have made every attempt from my mother-in-law, then, at that time, even, yes, sir, to do it. My mother-in-law was sick and under a doctor's care at that time as a result.

Q. Is there anybody else who could substantiate this alibi that you were not in New Jersey at about 3 o'clock?

A. There are many people who could, but they say it is [fol. 112] so long ago they cannot remember and they cannot testify for sure.

Q. Well, you say there are many people. You were at your mother-in-law's, you say, until shortly before 2 o'clock?

A. I was at my mother-in-law's from when I left my apartment, it was about 11 o'clock in the morning, and we went down there.

Q. Until what time?

A. What?

Q. Then you say you left your mother-in-law's?

A. I left about 2 or 2:30, yes, sir.

Q. You left there at 2 or 2:30 from your mother-in-law's and you went to see Nick Prosk?

A. That is true.

Q. So you got there when?

Mr. Mehler: I object to this. We have been over this.

Mr. Malech: No. I think he has changed it a bit. I think the jury is entitled to know.

The Court: I will allow it.

Q. You say you left about 2 or 2:30. When did you go over to see Nick Prosk?

A. It was between that time. That is what I said before.

Q. Between 2 and 2:30?

A. Yes, sir.

Q. At that time, you saw Mr. Wash and the boss at Dairy Lea?

A. Yes, sir.

Q. How long were you there?

[fol. 113] A. It couldn't have been very long.

Q. What is that?

A. It couldn't have been very long. I wouldn't say it exceeded more than 15 or 20 minutes at the most, if it was that long. I seen the guard that was there at the door, and he nodded to me.

Q. Do you know his name?

A. No. I don't know him at all. Practically, it was just a casual nod.

Q. Did you see anybody else?

A. Yes. I seen a man come out of the office. That is, this is the office that is in the inside office, not the office that I had been, and I seen a man come up there, because I had——

Q. Did you try to get in touch with him to come here today?

A. No. He had just seen me when I passed, and I had——

Q. Do you know his name?

A. No, I don't. I asked my——

Q. Did you make any attempt to get his name?

A. I have two attorneys. I made an attempt to try and get all these people here, because they did see me on that day, and I was in New York. I was never in New Jersey on this day with this crime I am charged with.

Q. And you definitely know all these people saw you there between 2 and 3 o'clock?

A. I certainly am.

Q. And, from there, you went directly home?

A. Yes.

Q. Or you went to your mother-in-law's?

[fol. 114] A. I had a bag of milk. Excuse me, a case.

Q. Where did you buy the milk?

A. I didn't buy it. It was given—it was asked me, some kids.

Q. You picked it up at Dairy Lea?

A. No, I didn't pick it up. Mr. Nick Prosk told me, he says, "There is some kids in the house," he says, "there is some milk there, help yourself." He says, "There is a bag, take some for the kids."

I took a couple of bottles of milk for the kids, and that is the truth.

Q. So that, between the hours of 2 and 4 o'clock in the afternoon, you would say that you were at your mother-in-law's house, and you were at the Dairy Lea place?

A. Yes, sir, and I left.

Q. And you walked from one place to the other and back again?

A. Yes, sir. I left again, too, as I told you before.

Q. When did you leave again?

A. When I went back to my mother-in-law's house with the milk, I left, and I went next door to the delicatessen.

Q. What time was that?

A. Well, that must have been just a few minutes after.

Q. After what?

A. What?

Q. A few minutes after what?

A. After my return to my mother-in-law's

Q. Do you know the time that you returned to your [fol. 115] mother-in-law's?

A. I would say it would be about twenty to 3, somewhere around there.

Q. Twenty to 3?

A. I cannot be certain.

Q. Then where did you go?

A. I took the milk in to my mother-in-law's house. I remember I laid back and took another piece of ice out of the ice box, and they even made a joke out of it. They said——

Q. Never mind what they said, Mr. Hoag. You say you left. When did you leave?

A. I left right after that.

Q. Where did you go?

A. I went next door to the delicatessen.

Q. What is it, a store?

A. Yes, sir, it is a delicatessen.

Q. Had you ever been there before?

A. Yes, sir, I have been there before.

Q. How many times in the delicastessen before that?

A. I couldn't say. I would say several times.

Q. Quite often? You went to visit your mother-in-law very often?

A. That is right, yes, sir.

Q. You were friendly with her?

A. Yes, sir.

Q. Do you know the man——

A. I knew them vaguely.

Q. —who owned the delicatessen?

A. Yes, sir. They had——

Q. Was he there that day when you came in?

[fol. 116] A. Yes, he was.

Q. You remember him distinctly?

A. I certainly do, because he was quarreling.

Q. Do you know his name?

A. No, I don't.

Q. And you were there just about from quarter of 3 to near 3 o'clock. Right?

A. Well, 25—22, I imagine that would be.

Q. Pretty close to 3 o'clock, wasn't it, Mr. Hoag?

A. I wouldn't say so. I would say about 20 or 25 to or 20.

Q. Around about twenty to 3. Then you left the Dairy

Lea, you said, between 2 and 2:30, and you went right home. And then you went out again. You said you left your home about twenty to 3. Right?

A. That is the second time.

Q. How long did it take you to get to the delicatessen?

A. It is only right next door.

Q. It was right next door?

A. Yes, sir.

Q. And you had been there before many times?

A. Yes. sir, that is true.

Q. And you never knew the name of the owner?

A. No, I don't know their owner.

Q. Well, you knew him, didn't you?

A. I know he was there.

Q. You had seen him many times?

A. Yes, I did.

[fol. 117] Q. Who else was in the delicatessen? Any other persons?

A. Yes, sir, his wife.

Q. His wife?

A. Yes, sir.

Q. And this was on Septe. ber 20, 1950?

A. Yes, sir.

Q. And about twenty minutes to 3?

A. Yes, sir.

Q. And you knew that you had been there quite often?

A. Yes, sir.

Q. And you knew these two people?

A. Yes, sir.

Q. Did you make any attempt to bring them here in Court today?

A. I have made every attempt possible, in view of my incarceration. I am limited. I have done everything I can to get these people over here.

Q. They are not here either. You said this happened so long ago they cannot remember. Did you make any attempt to find out what their names are?

A. I don't know, sir. I can write one letter out of the County jail, one letter a week.

Q. Did you make any attempt to contact them?

A. Yes, through my attorneys, I did.

Q. Why didn't you contact your mother-in-law and get their names? She didn't die right away, Mr. Hoag?

A. I told you my mother-in-law was contacted at the time.

Q. Did she give you the names?

A. My mother-in-law was ill at the time, she was very sick.

Q. Was there anybody she could get that you know of [fol. 118] to get these names, do you know?

A. The attorney who represented me at the time, he went to see the people themselves. He didn't have to get their names. He went to see the people themselves, and they said that it happened so long ago, they cannot remember.

Mr. Malech: No further questions.

By Mr. Mehler:

Q. Now, you did give these names to Mr. Cummins?

A. Yes, sir, I did.

Q. And, as a result of your giving these names to Mr. Cummins, Mr. Dempsey, who is seated at the table, came back and gave you a report, did he?

A. Yes, that is true, yes, sir.

Q. And he told you he had seen these people?

A. Yes, sir.

Q. Now, during all the time from September, 1950 to the present day,—or, excuse me.

Mr. Mehler: I withdraw that, Mr. Robinson.

Q. From November, 1950, you have been incarcerated. Is that right?

A. November 20, 1950, I haven't been out on the street since that day, no, sir.

Q. All right.

Mr. Mehler: I have no further questions, sir.

By Mr. Malech:

Q. You say you haven't been out on the streets since that [fol. 119] day?

A. I have been locked up.

Q. Because you committed another crime?

Mr. Mehler: I object to that, if your Honor please.

Mr. Malech: I think I am entitled to show the reason he was in——

Mr. Mehler: What time?

The Court: The State has a perfect right to ask the witness about his incarceration as to what, for what he has been incarcerated. At least, let me put it this way: I think the State is entitled to show how long he has been in jail or awaiting trial for this particular crime. Put it that way.

How long have you been in jail awaiting trial for this trial involving Mr. Yager?

The Witness: I would say the—do you mean with the last trial, your Honor?

The Court: With this last, with this current trial, present trial.

The Witness: The present trial, five months.

The Court: Five months?

The Witness: Five months.

The Court: Any other questions?

Mr. Malech: Yes.

By Mr. Malech:

[fol. 120] Q. So that when you said you had been incarcerated, it was not in New Jersey. Isn't that true?

A. As a parole violator.

Q. And so it was not in New Jersey, was it? It was in New York?

A. Well, I cannot say that unless I explain myself.

Q. You were incarcerated in the State of New York?

A. As a parole violator. I absconded from parole at that time. I told you that before.

Q. Now, you said just a moment ago on re-cross that you gave the names of these people at the delicatessen, Mr. Hoag, to Mr. Cummins. Is that correct?

A. I said I didn't give the names. I says, I said there was two people who owned the store, that I know who owned it.

Q. Your attorney just asked you that question, and said, "Did you give the names of these people to Mr. Cummins"?

A. Well, I misunderstood my attorney, then.

Mr. Mehler: What I meant——

Q. Suppose you tell us what you did do so far as the delicatessen store owners and his wife are concerned?

A. Well, Mr. Dempsey seen me in the Bergen County jail

and asked me, "was there any witnesses that you can corroborate that you were not in New Jersey at the time?"

I says, "Yes, there is a lot of them."

So he says, "Who with regard to these delicatessen [fol. 121] people?"

So I said, "There is two people from a delicatessen on West 48th Street who seen me on that day. I don't know their names, but I had been in there years before, and I still don't know their names."

The Court: Is that all?

Q. You say that Mr. Dempsey, who is sitting here, gave you a report that he had seen these people?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. And isn't it true that in that report he told you that Nick Prosk would not testify that he saw you in the afternoon of September 20, 1950?

A. Mr. Dempsey didn't say that.

Q. Didn't he also say that Mr. Prosk would not testify that he saw you in the afternoon between 2 and 2:30?

A. Mr. Dempsey didn't say that.

Mr. Malech: No further questions.

Mr. Mehler: Nothing further.

The Court: I will ask the witness a question.

By the Court:

Q. Looking back to September 20th, are you able to tell us when you last reported to your parole officer?

A. 20?

Mr. Mehler: 20, sir.

[fol. 122] Q. September 20, 1950.

A. Yes, sir. What was that question?

Q. Well now, listen carefully. You are anxious to present your case. Looking back to the month of September the 20th, 1950,——

A. Yes.

Q. —will you tell us, if you can, when you last reported to your parole officer?

A. Yes, sir. I would say it was on September 23rd or 24th of 1950, because——

Q. September 23rd?
A. Or the 24th.
Q. Or the 24th?
A. Yes, sir.
Q. Did I understand you correctly that you said that you did not report to him because you were discouraged and blew your top?. Was that your remark?
A. Yes, sir.
Q. So you misunderstood me. I said, as to your last report, when did you—what was the date of that report?
A. September 23rd or 24th of 1950.
Q. That is the last time you reported?
A. I reported yes, sir.
Q. Well, do not let us get confused. The last time you reported was September 23rd, and the reason you did not report after that was because you became discouraged?
A. Yes, sir.
Q. When were you supposed, in the ordinary course of your parole, to report the next time after September 23rd, if you can tell us?
A. I believe it was—I cannot be certain, but I think it [fol. 123] was the next week or the following week. I cannot be certain.
Q. Then that was over the 30th, the first week in October?
A. I would say so, yes, sir.
Q. When did you first learn of this charge against you involving Mr. Yager?
A. On September 23rd, 1950.
Q. How did you learn it?
A. I learned it, your Honor, I went to——

Mr. Mehler: Your Honor please, I believe that now the witness is confused, because the date given——
Mr. Malech: If the Court please,——
Mr. Mehler: I will ask the jury be excused on that point, sir.
Mr. Malech: I object to it.
The Court: If he is confused, he will have an opportunity to straighten it out.
Mr. Mehler: All right. I will straighten it out.
The Court: I am not attempting in any way to confuse him.

Mr. Mehler: I know that, sir. I didn't mean to intimate that.

The Court: And the Court wants to get at the truth.

By the Court:

[fol. 124] Q. Can you tell us when you first learned that you were charged with this robbery of Mr. Yager?

A. Yes, sir, I can.

Q. When was it?

A. At the time I—I reported to my parole officer. He told me to report—I think it was the next week or the following week, I had forgotten. And then I went home to my mother's house that day, and my mother told me there was policemen here and "they wanted you for robbery in New Jersey." So I didn't know what——

Q. You learned about it first from your mother?

A. From my mother in Brooklyn, yes, sir.

Q. And that was probably shortly after you had seen your parole officer?

A. That was the same——

Q. Just a minute. Wait until the Court finishes, will you please?

A. I am sorry.

Q. So that then it was probably shortly after you last reported to your parole officer on September 23, 1950. Is that right?

A. That was that afternoon. I reported to my parole officer in the morning, and that was the afternoon.

Q. Then you learned about it?

A. Yes, sir.

Q. I see. And that was the reason you made no further report to your parole officer?

A. No, sir, that was not the reason.

Q. What was the reason?

[fol. 125] A. That was one of the reasons, one of the reasons was, like I said before, I was denied to work on the trucks to get a decent salary.

I was denied to drive a truck with the trucking company.

I was denied to work on the pipe line over-seas and get a decent wage, and that is when I was about—that I just got so disgusted; in fact, I never thought about it again until it was in November, 1951, when I learned that a charge

vas against me, and I couldn't believe it. I thought this, ir, a thing only happened in a book or a magazine.

Q. All right.

The Court: That is all the questions the Court has.

Mr. Mehler: I would like to respectfully point out to the Court, sir, that the Yager indictment was from the September Term 1951.

The Court: I know it, I know it.

Mr. Mehler: In answer to your Honor's question.

The Court: He has answered the question and said he learned about it on September 23rd or the afternoon of that day, 1950.

Mr. Mehler: 1950?

The Court: Yes, sir.

Mr. Mehler: Well, as a matter of fact, the record shows [fol. 126] that the man was not indicted on the Yager indictment until 1951.

The Court: Yes.

Mr. Mehler: When there were three other indictments, were there not?

Mr. Malech: I object.

Mr. Mehler: We have gone into that, and I think I have right to show it.

Mr. Malech: I object to any other indictments. We are trying this one indictment.

The Court: I will permit it.

Mr. Mehler: Yes, sir.

By Mr. Mehler:

Q. There was three other indictments, was there not?

A. Yes, sir.

Q. Galiardo?

A. Yes, sir.

Q. Cascio?

A. Yes, sir.

Q. And Capezzuto?

A. Yes, sir. I think there was another one.

Q. And they are the ones that you knew of in September of 1950?

A. Well, that is what I told the Judge.

Q. So you didn't——

The Court: All right. It will be permitted. He has explained it.

Mr. Mehler: He has explained it.

[fol. 127-130] Q. And you went to trial on those indictments?

A. Yes, sir.

Q. In 1952?

A. Yes, sir.

Q. 1951, rather?

A. Yes, sir.

Mr. Mehler: That is all, thank you.

The Court: That is all.

Mr. Malech: Just a moment, if your Honor please.

By Mr. Malech:

Q. From the time that you heard that an armed robbery had been committed, which was on September 23, 1950, you say, did you make any attempt to find out what it was about?

A. No, sir. I didn't think nothing of it. I just—I couldn't believe it; in fact, I didn't know—I didn' know nothing about it. All I know——

Q. You didn't care to find out from anybody what it was about?

A. I am a convict, and those things are a daily occurrence. I just didn't think of it. It has got nothing to do with me. I don't see why it should have any bearing on me.

The Court: All right.

Mr. Mehler: Does the Court have anything further.

The Court: Nothing further.

Mr. Mehler: That is all, Mr. Hoag, thank you.

(Witness excused).

[fol. 131] REBUTTAL

Mr. Malech: Mr. De Marco, please, rebuttal.

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CARL DE MARCO, called as a witness in rebuttal, being first duly sworn, testifies as follows:

The Court: We will take a short recess at this time, a five minute recess.

(A short recess was taken).

(The Clerk polls the jury).

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CARL DE MARCO, recalled, testified as follows:

The Court: The witness is Mr. Carl De Marco, for the State on rebuttal. Right?

Mr. Malech: Yes, sir.

Direct examination.

By Mr. Malech:

Q. Mr. De Marco, on July 24, 1951, what was your occupation?

A. County detective.

Q. And, in the course of your duties on that day, do you recall seeing Mr. Anthony Dottino and Charles Galiardo?

A. I do.

The Court: Anthony who?

Q. I show you——

The Court: Dottino?

Mr. Malech: Anthony Dottino and Charles Galiardo.

Q. Are they two of the gentlemen that appeared yester-

[fol. 132] day;——

A. Yes.

Q. —and testified here?

A. That is right, sir.

Q. Were you in Court when they testified?

A. Yes, sir.

Q. I show you this statement and ask you if you recognize it?

A. I do.

Q. Whose names appear upon that statement?

A. Charles Galiardo.

Q. Does your signature appear on that?

A. Yes, sir.

Q. In what capacity?

A. As the maker of the statement.

Q. Will you tell the Court and the jury the circumstances, where and when and who was present, when the statement was made?

A. We had been to New York City regarding an identification of suspects at the Center Street Headquarters and, after certain pictures were identified, this statement was taken at Gay's Tavern at the scene of the crime.

Q. Who was there?

A. Mr. Galiardo, Mr. Dottino and two other persons who were not involved in the original stick-up.

Q. And, at that time,— or, do you recognize this photograph?

A. Yes, sir.

Q. At that time did Mr. Galiardo see that photograph?

A. Yes, sir.

Q. And pursuant to that, did you take a statement from him?

[fol. 133] A. Yes, sir, that was the result.

Q. Is that the statement?

A. That is right, sir.

Mr. Malech: If the Court please, I would like at this time to offer into evidence the statement and the photograph as going toward the credibility of the two witnesses, and I will offer another statement, also, who testified here yesterday.

Mr. Mehler: I object, sir, to any statements. It is not the best evidence. The men were here in Court pursuant to a subpoena issued by the State, and the defendant appeared on the stand, and they had a perfect right to call them and introduce their statements. This is not——

The Court: They were on the stand for the defense, as I understand it.

Mr. Mehler: That is right, sir.

The Court: And they testified for the defense and they were subject to cross-examination at that time.

Mr. Mehler: That is true, sir.

The Court: And they were cross-examined. Now, this statement, which is only one so far, was offered in rebuttal as to attack the credibility of their testimony.

Mr. Malech: Yes, sir. And I respectfully, your Honor, [fol. 134] refer you to the cases of Wadsworth vs. Public Service reported in 122 N. J. 367, Wilson vs. Gula, 12 N. J. Misc., 53; State vs. Hummer, 72 N. J. Law, 328.

The Court: Yes.

Mr. Malech: And I would like to offer this and have it marked.

The Court: Suppose you get the other one and offer them both at once, and then I will hear counsel.

Q. Mr. De Marco, did you take that statement from one witness? Whose statement is that?

A. Yes, sir; Anthony Dottino.

Q. And in whose writing is that?

A. That is my writing, sir.

Q. Who had signed it?

A. Anthony Dottino.

Q. Were you present?

A. Yes, sir.

Mr. Malech: I would like to offer the two statements and the photograph, if your Honor please.

By Mr. Mehler:

Q. You were the maker of the statement, is that right? You wrote them out a year ago?

A. That is right.

Mr. Mehler: I object to that on the same ground, sir. The cases cited by the State can be a question of surprise for the most part if they had been State witnesses and [fol. 135] renounced these statements, certainly, this evidence as to credibility would be admissible; but I mean they were defendant's witnesses.

The Court: Yes.

Mr. Mehler: They had them available. They could have called them, and I respectfully submit it is not the proper evidence.

The Court: I will admit the statements. However, I am doubtful about the photograph.

Mr. Malech: I will withdraw the offer of the photograph, sir. If there is any question, I will withdraw it, so far as the photograph.

The Court: I will allow the statements to be marked in evidence for the purpose of attacking the credibility, if it does so, for the two witnesses for the defendant.

I think both of these men acknowledged the signatures yesterday when they testified.

(Two Papers Marked Exhibits S-1 and S-2, Respectively, in Evidence).

Mr. Malech: Cross-examine. Your Honor, as I understand it, counsel objects to the photographs?

Mr. Mehler: Yes.

Mr. Malech: And I withdraw the offer of it.

Cross-examination.

By Mr. Mehler:

Q. Mr. De Marco, you did this in the course of your [fol. 136] duties as a police officer. Right?

A. That is right, sir.

Q. Where did you meet these people, at the Prosecutor's Office?

A. No, sir, at the tavern.

Q. You went to the tavern?

A. That is right.

Q. Then you went to Center Street?

A. That is right.

Q. And you went back to the tavern to take the statements?

A. No.

Q. Didn't you testify you took these statements at the tavern?

A. The next day.

Q. Oh, then you went back to the tavern the next day?

A. That is right.

Q. Is that the usual police method, Mr. De Marco?

A. Not usual.

Q. Well, was this an unusual case?

A. No, sir.

Q. Don't you usually have witnesses come into the Prosecutor's Office or meet you at a police station?

A. If it is convenient.

Q. Well then, the business of the State in prosecuting crime, you make it convenient, don't you, Mr. De Marco?

A. To the people involved.

Q. Well, you also make it convenient for everyone, don't you?

A. That is right, sir.

Q. Well, certainly, the Prosecutor's Office—how far from the Gay's Tavern is the Fairview Police Station?

[fol. 137] A. About a mile.

Q. And you didn't think of meeting them at the police station?

A. No, sir.

Q. Well, they have typewriters at the police station, don't they?

A. I don't type, sir.

Q. Were you alone?

A. That is right, sir.

Q. Was there any one there at the police station who could type, if you know?

A. I didn't ask. I didn't go there.

Q. You elected to meet them at the tavern?

A. I went to the scene of the crime.

Q. I see. And you stayed there. Now, you heard Mr. Dottino testify yesterday, did you? You were here in Court all day yesterday?

A. Yes, sir.

Q. And you heard Mr. Galiardo testify?

A. Yes, sir.

Q. Did you hear them say that part of what they said was left out of these statements?

A. Yes, sir.

Q. They did say that?

A. That is right, sir.

Q. They said that they thought that was the man?

A. That is right.

Q. Did you put that in the statement?

A. They didn't say that then.

Q. Oh, they didn't say that?

A. No, sir.

Q. You testified in 1951, didn't you?

A. I did not.

Q. You did not testify in this cause?
A. No, sir.
[fol. 138] Q. Were you in Court on that date?
A. No, sir.
Q. You weren't here at all?
A. That is right, sir.

Mr. Mehler: That is all, Mr. De Marco.
Mr. Malech: Thank you, Mr. De Marco.
The Court: That is all.

(Witness excused).

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Mr. Malech: No further witnesses, your Honor.
The Court: We are ready to summarize the issues then.

(Counsels' summations to the Jury, and the Court's charge to the jury follow at this point).

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[fol. 139] Reporter's Certificate to Foregoing Transcript omitted in printing.

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[fol. 140] In the Supreme Court of New Jersey

State of New Jersey, Plaintiff-Respondent

v.

William Hoag, Defendant-Appellant

Opinion—May 14, 1956.

Argued March 21, 1956

On appeal from the Superior Court, Appellate Division.

Mr. Robert E. Knowlton, of the Iowa Bar, argued the cause for appellant. Mr. George Warren, Attorney.

Mr. William J. Arnold, Assistant Bergen County Prosecutor, argued the cause for the State. Mr. Guy W. Calissi,

Bergen County Prosecutor, Attorney. Mr. William C. Brudnick, Special Assistant Prosecutor, on the brief.

The opinion of the court was delivered by

WACHENFELD, J.:

At about 3 p. m. in the afternoon of September 20, 1950, three or four patrons, one of whom was Elmer S. Yager, were seated at the bar of Gay's Tavern on Bergen Boulevard in Fairview, New Jersey, sipping beer and observing a telecast of a baseball game. The tranquility of that scene was interrupted by three men, each carrying a gun, entering through the front door of the tavern. One of them brusquely anounced: "This is a stick-up, everybody line up against the wall." The patrons, together with the owner of the tavern, proceeded to do as they were told, accelerated by slaps and shoves administered by the stick-up men. Once lined up against the wall, each was relieved of his valuables and money and then taken into the kitchen. They were placed upon the floor, their hands and legs being bound. Their mission accomplished, the robbers left the tavern and made a get-away unimpeded.

The not uncommon factual pattern recited above gives rise, on this appeal, to an arresting question of law growing out of legal proceedings subsequently taken against the defendant, who the jury below was satisfied beyond a reasonable doubt was one of the robbers.

[fol. 141] Within a matter of weeks after the robbery, the victims were shown photographs of criminals known to have engaged in activities similar to those described above. Two of the victims identified the photograph of one man, the present defendant, as one who had engaged in the robbery. About a year later, the defendant was apprehended by the New York police authorities for another offense and returned for prosecution here.

Subsequently, the Bergen County grand jury returned three indictments, each containing two counts, against the defendant, the first count being for armed robbery of a specific individual and the second count for carrying a concealed weapon. For some reason, which does not appear in the record before us, no indictment was returned against the defendant for having committted armed robbery upon Elmer S. Yager; the victims named in the indictments were

limited to Patsy Cascio, Louis Capezzuto, and Charles Galiardo.

On May 26 and 27, 1952, trial was had on the three indictments, and each of the three indictment-victims, Cascio, Capezzuto and Galiardo, was called to the witness chair by the State. However, on the stand they either disclaimed ability to identify the defendant or positively identified him as not having been one of the robbers. Each of these three witnesses recanted his prior positive identification of the defendant made through the use of his photograph. The State was able to produce only one witness, Yager, who gave an unqualified identification of the defendant at the trial.

The defense was an alibi, but it was unsupported by any witness other than the defendant.

The trial court, after dismissing the concealed weapon counts of the three indictments, submitted the case to the jury, which returned a verdict of not guilty.

Probably stimulated by the trial judge's comment as to the obvious guilt of the defendant, referred to in the appellant's brief, the Bergen County grand jury, within a matter of days after the acquittal, returned a two-count indictment against the defendant charging him, in the first count, with the commission of armed robbery upon Elmer S. Yager, and in the second count with carrying a concealed weapon in violation of N.J.S. 2:176-41 (now N.J.S.2A: 151-41).

[fol. 142] However, before the new indictment could be moved for trial, the defendant was returned to New York for incarceration for an offense committed within that jurisdiction. As a result, the trial of the Yager indictment did not get under way until October 18, 1954.

At the second trial, the State offered only one witness, Yager, who again positively identified the defendant as one of the three robbers who had entered the tavern on September 20, 1950 and held him up. After the defense had attacked Yager's ability to recall places and incidents occurring more than four years previously, on redirect examination he was asked how he could remember the defendant on the afternoon of September 20, 1950. He replied impressively: "Anybody would have a gun stuck into them, they would sure remember the fellow's face, directly in front."

The other three victims of the robbery testified on behalf of the defendant at the second trial. Their testimony was similar to that which they had given at the first trial. The defendant took the stand in his own behalf and again offered an alibi defense. No witnesses were offered to support this defense, he having testified they were unavailable by reason of death or unknown whereabouts.

The jury returned a verdict of guilty on both counts of the indictment. Following sentencing, the concealed weapon count was ordered dismissed by the trial judge.

The defendant was permitted to appeal to the Appellate Division as an indigent person from the judgment of conviction on the first count of the indictment. As on the appeal to this court, no question was there raised as to the defendant's guilt or innocence, the appeal being limited solely to the question whether the second trial, on the Yager indictment, violated our constitutional prohibition against double jeopardy, a defense which the defendant had also raised at the trial. The Appellate Division affirmed, *State* v. *Hoag*, 35 N.J. Super. 555 (App. Div. 1955), and the defendant appealed to us as of right, see R.R. 1:2-1(a), and as an indigent person pursuant to R.R. 1:2-7. The appeal was originally considered without oral argument; subsequently we assigned counsel to the defendant. New briefs were presented and counsel argued the cause before us at length.

[fol. 143] The constitutional question is advanced here by the defendant in the following form: "The basic issue in this case is whether the State may subject an individual to a separate trial for the robbery of each victim when the robbery of all was at the same time and at the same place."

The New Jersey Constitution of 1947 states the prohibition against double jeopardy in the same language as did the 1844 Constitution:

> "No person shall, after acquittal, be tried for the same offense." N. J. Constitution, Art. I, par. 11. See N. J. Constitution of 1844, Art. I, par. 10.

The difficulty, of course, lies in ascertaining what is meant by the constitutional concept of "the same offense," acquittal, or conviction, of which will preclude a second trial. The question has arisen in many contexts, as, for

example, where a person accused of a minor offense is acquitted and he is again charged on the same facts in a more aggravated form. See *States* v. *Labato*, 7 N.J. 137, 146 (1951); *State* v. *Shoopman*, 11 N.J. 333 (1953); *State* v. *Cooper*, 13 N.J.L. 361 (Sup. Ct. 1833); *State* v. *Mowser*, 92 N.J.L. 474 (E. & A. 1919). Double jeopardy may also be called into play where a single act involves multiple consequences, usually the consequences being experienced by a number of individuals. See *State* v. *Cosgrove*, 103 N.J.L. 412 (E. & A. 1927); *State* v. *Pa. R.R. Co.*, 9 N.J. 194 (1952).

The test most widely employed in this jurisdiction to resolve the double jeopardy question in such circumstances is whether the evidence necessary to sustain the second indictment would have been sufficient to secure a legal conviction on the first. *State* v. *DiGiosia*, 3 N.J. 413, 419 (1950); *State* v. *Labato*, supra, at 144; *State* v. *Shoopman*, supra, at 335.

The defendant acknowledges that the application of the "same evidence" test results in a denial of the alleged double jeopardy violation in the case sub judice. For the [fol. 144] evidence needed to support the Yager indictment obviously would not have been sufficient to secure conviction upon the three earlier indictments, inasmuch as the latter indictments charged a forcible taking of *different* property from three *different* individuals.

Nevertheless, it is urged the present factual pattern falls within the "single act" category, and despite the fact several persons were robbed, but a single "offense," in the constitutional sense, was committed by the defendant for which he may not be retried. It is said the "same evidence" test is modified in this jurisdiction where there are multiple victims of a "single act." See *State* v. *Cosgrove*, supra; *State* v. *Pa. R.R. Co.*, supra.

However, we cannot concede that the defendant may avail himself of the plea in this case under any recognized concept of double jeopardy. For the fact remains that there was not but a "single act" committed by this defendant which simultaneously, and without more, affected several individuals. At the very least, putting aside the more subjective element of placing each of the victims in fear, the crime with which the defendant was charged in each indictment required the commission of a separate and inde-

pendent act with respect to each victim, i.e., the forcible taking of the victim's property. Additionally, to be precise, it was in fact committed at a different time, either prior or subsequent to the other independent acts charged in the other indictments. As was said in *People* v. *Lagomarsino*, 97 Cal. App. 2d 92, 217 P. 2d 124, 129 (D. Ct. App. 1950):

> "Whatever conflict may exist in the cases involving offenses against property, when we come to offenses against persons, there is more unanimity. Particularly is this true of robbery cases, the offenses here involved. The majority, and certainly the better rule, is that there is a separate offense committed against each person robbed. Obviously, a robbery of several persons where property is removed from each person, involves a separate act and a separate intent for each victim."

[fol. 145] See also *People* v. *Rodgers*, 102 Misc. 437, 170 N. Y. Supp. 86 (N. Y. Cty. 1918), aff'd 184 1st Dept. App. Div. 461, 171 N. Y. Supp. 451 (1918), aff'd 226 N. Y. 671, 123 N. E. 882 (1919).

The subject matter has evoked many divergent and conflicting reactions and has engendered a host of comment. See, e.g., 65 Yale L. J. 339 (1956); Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 Iowa L. Rev. 317 (1954). Nevertheless, Judge Jayne, below, in two short paragraphs succinctly stated and applied the basic reasoning and philosophy of the New Jersey decisions to the case sub judice. His appraisal, which coincides with our own views, was (35 N. J. Super. at 560):

> "Neither the identical act nor the same evidence norms avail the defendant in the present case. Conceivably the one act of brandishing a pistol in a menacing manner might have simultaneously placed Cascio, Capezzuto, Galiardo, and Yager in a state of fear and intimidation, but to constitute robbery, the act must necessarily be complemented by the additional and successive act of taking 'from the person of another, money or personal goods and chattels, . . .'
>
> "At his former trial the defendant was not charged with placing Yager in fear or taking any money or

personal property from him. Surely evidence that the defendant robber Yager would not be necessary to establish his guilt of robbing Cascio, Capezzuto, and Galiardo. The robbing of Yager was not an essential ingredient or legally integral part of the alleged offenses of robbing the other three."

The conclusion finds support in an imposing array of authority there cited.

Next, the defendant contends that even if the plea of double jeopardy does not preclude a second prosecution in the instant case, nevertheless the jury's verdict of not guilty in the first trial prevents relitigation of any fact [fol. 146] encompassed by that verdict under the principle of *res judicata*. See *Sealfon* v. *U. S.*, 332 U. S. 575 (1948); *U. S.* v. *Oppenheimer*, 242 U. S. 85 (1916); *Harris* v. *State*, 193 Ga. 109, 17 S.E. 2d 573, 147 A.L.R. 980 (1941). The only controverted issue of fact in the first trial, it is said, was the identity of the defendant as one of the robbers who held up Gay's Tavern, and since the first jury acquitted the defendant upon the first three indictments, the State cannot relitigate the issue of the defendant's identity as the man who held up Yager inasmuch as he was robbed at the same time and place as the other three.

Actually, it is not the doctrine of *res judicata* which is invoked here but that of collateral estoppel. For, as we have already outlined, the offenses charged in the several indictments constitute separate and distinct crimes, and while the parties may be the same, the State's cause of action under each indictment is a different one. That being the case, the State is precluded only from relitigating those facts which were actually found by the first verdict. Restatement, Judgments, § 68; Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 10 (1942).

The first three indictments charged the defendant with the forcible taking of property from three individuals, Cascio, Capezzuto and Galiardo, by placing them in fear. The fourth indictment, on the other hand, alleged that the defendant "did willfully, feloniously and forcibly take from the person of one Elmer S. Yager . . . one wallet and one wrist watch of the value of $50 . . . by putting him in fear." Thus, in so far as the issues were framed by the indictment, the jury's acquittal on the first three was not

inherently inconsistent with the guilty verdict on the last indictment.

Nor was the defendant's plea of alibi necessarily established by the first jury's general verdict of not guilty. There is nothing to show that the jury did not acquit the defendant on some other ground or because of a general insufficiency in the State's proof. *People* v. *Rodgers, supra; State* v. *Barton*, 5 Wash. 2d 234, 105 P. 2d 63 (1940). Obviously, the trial of the first three indictments involved [fol. 147] several questions, not just the defendant's identity, and there is no way of knowing upon which question the jury's verdict turned. Since it does not appear whether the acquittal was based on the determination of the question as to which the estoppel is sought in the second trial, the first verdict is not conclusive in the second trial. See Restatement, Judgments, § 68, Comment *1*.

*State* v. *Barton, supra*, is factually very close to the case at hand. There, the defendant was first prosecuted for the crime of first-degree murder, the State alleging the murder was committed during the course of a robbery. Following his acquittal, the State prosecuted for robbery on the same acts as were relied upon in the murder prosecution. In disposing of the claim that the judgment of acquittal in the murder prosecution was *res judicata* in the robbery prosecution, the court said (105 P. 2d at 67):

> "In the murder prosecution, the appellant's defense of alibi and the various related matters of fact set out in detail in his amended special plea were not actually or necessarily adjudicated, nor can it be said that the issues were limited, as appellant contends. Every material allegation of the information was placed in issue by the appellant's plea of not guilty, and the state had the burden of proof beyond reasonable doubt. It is not possible to determine whether the jurors returned a verdict of acquittal because they credited the testimony in support of appellant's alibi, or for the reason that they found the state's evidence insufficient as to one or more essential elements of the offense charged. They could have utterly disregarded all of the testimony adduced by the appellant in his defense and yet have returned a verdict of not guilty. The verdict and the judgment based thereon were not, therefore, *res judicata* as to appellant's alibi,

not as to any other particular fact. They were *res judicata* only as to the ultimate fact that appellant was not guilty of the crime of which he was accused."

[fol. 148] Accordingly, we conclude that the State was not collaterally estopped by virtue of the first verdict from relitigating the defendant's guilt on the Yager indictment.

Finally, the claim is advanced that the re-indictment and retrial of the defendant following his acquittal upon the first three indictments constituted a denial of due process of law under the Fourteenth Amendment of the United States Constitution because it offends fundamental justice. It is contended that to permit piecemeal indictments would allow the State, even though it knows all of the victims, to indict a defendant seriatim for each victim, thereby dragging out the prosecution and denying the defendant his constitutionally protected right to a speedy trial. This type of deliberate harassment by an over-zealous prosecutor, it is said, should not be tolerated.

Counsel for the appellant in his plea exhibits the same philosophy expressed in an article he wrote (10 Rutgers L. Rev. 97 (1955)) urging that if there be any advantage to be derived from the use of such procedure, it should inure to the benefit of the prisoner, although it has always been otherwise in this jurisdiction.

If this procedure has proven a factor in the vigorous administration of the criminal law, it has been for good and not evil, which is apparent by its long continuance. No persuasive reason has been profferred why a change should be made and still another obstacle placed in the path of the prosecuting authorities to prevent the escape of the guilty. When and if the change is made, it should be the product of a legislative mandate and not by judicial overthrow of a long-continued practice. We perceive no constitutional prohibition against the procedure pursued here.

The judgment below is affirmed.

[fol. 149] HEHER, *J.*, dissenting:

The determinative question on the trial of the earlier indictments accusing the defendant Hoag of the armed robbery of Cascio, Capezzuto and Galiardo, as separate and distinct offenses, was the identity of the accused as one

of the perpetrators of the robbery of the named individuals and Yager, too, all as part of the same transaction; and it was resolved by the acquittal of the accused, a finding conclusive of the basic issue, on the plainest principles of justice precluding its relitigation on the trial of the fourth indictment, returned immediately after the acquittal, laying to Hoag the armed robbery of Yager at the same time and place.

My brethren say: "Nor was the defendant's plea of alibi necessarily established by the first jury's general verdict of not guilty. There is nothing to show that the jury did not acquit the defendant on some other ground or because of a general insufficiency in the State's proof." But there can be no doubt, I submit, of the issue submitted to the jury and the fact upon which the exculpatory verdict turned, *i.e.*, the accused's participation in a holdup that was a conceded fact.

The appendix submitted to the Appellate Division was found to be deficient; and the "factual structure upon which [fol. 150] the defendant's points of appeal" were considered took the "form of a statement of facts" to which counsel for the State and the accused subscribed and the trial judge gave his approval. See *R. R.* 1:6-2; 2:6. *State* v. *Hoag*, 35 *N. J. Super.* 555 (*App. Div.* 1955). The certification thus made was the return of the three indictments severally charging the armed robbery of the named individuals, as distinct offenses, the consolidation of the indictments for trial, and the acquittal on all three indictments following a jury trial held May 26 and 27, 1952; also, that the judgment under review is founded on an indictment returned July 17, 1952, accusing Hoag of the armed robbery of Yager "on the same occasion, as set forth in the indictments of June 26, 1951;" that Yager "testified as to the details of the holdup at the trial" of the three earlier indictments; and that prior to and in the course of the trial of the later indictment now before us, the accused "invoked the defense of former or double jeopardy on the grounds that there was but one incident and one holdup," and "all of the victims were present at the same time and place," and "the testimony of all of the victims, including" Yager, "was given at the first trial, when defendant was acquitted."

On our order a transcript of the evidence adduced at the

first trial was provided; and this was followed by a stipulated addendum to the Statement in Lieu of Record, declaring that at the first trial "there was no dispute as to the fact of the robbery or that the said victims, Cascio, Capezzuto, and Galiardo, as named in the separate indictments, were robbed;" that "(d)efendant testified as to the alibi and the three victims named testified on behalf of the State as to the defendant's identity," and "(t)hese same victims testified on behalf of the defendant at the second trial."

It is said in the majority opinion that "(w)ithin a matter of weeks after the robbery, the victims were shown photo-[fol. 151] graphs of criminals known to have engaged in (similar) activities," and "Two of the victims identified the photograph of one man, the present defendant, as one who had engaged in the robbery." But this was not so as to either Cascio or Capezzuto. They each denied in clear and positive terms, at the first trial and the second, that the accused was one of the perpetrators of the holdup; and there was no plea of surprise at the earlier trial or an offer to neutralize their testimony by proof of such photographic identification, nor was this made the subject of interrogation on the second trial when they testified for the accused. The State made no such contention on either trial.

Galiardo, the operator of the tavern where the holdup occurred, had identified the accused by means of a photograph shown to him in New York. And he testified at the first trial, as the State's witness, that "This Mr. Hoag looks like the man that was in my place," "I'm not positive, but I think so;" that he viewed two police "lineups" in New York when Hoag was in custody there, "12 men in the lineup," and he said, "I don't think the man is there," and this he reiterated on the witness stand. "Q. But if Hoag were in any of those lineups that you were at you did not identify him? A. That's right. Q. You say he wasn't there? A. I don't think he was there. Q. You couldn't identify him at that time? A. Right." His testimony on the second trial was in substance the same; he said that, having seen the accused "in the flesh", he could not be positive that he was a participant in the holdup; he could not "swear that it was him;" and he could not "swear that it wasn't."

The State's witness, Dottino, who was in the tavern at the time, said of a picture shown to him "the next day":

"It looks like the man but I'm not positive." "Q. Look at this picture. A. I will look at it sure. It looks like the man but it isn't him. Q. Did you identify this picture as [fol. 152] being one of those involved in the stickup? A. I'm not positive, I'm not sure." He was called to a police "lineup" in New York, but "the man wasn't there that stuck us up;" the "fellow that held us up was darker, thin, weighed about 160 or 165 pounds, thin, come in with a brown jacket he had on;" the "fellow that stuck us up was dark, very dark." The witness said he also had been robbed, but there was no indictment charging a taking from his person. His testimony on the later trial was the same.

The jury in the present case apparently found the issue factually troublesome. It returned a verdict of guilty after having reported a disagreement four hours earlier, which the court refused to accept.

The County Prosecutor was at a loss on the oral argument to explain the omission at the outset to return an indictment for the robbery of Yager, who was a witness before the Grand Jury on the first presentation and identified the accused on the trial of the three indictments later returned. The prosecutor was not then in office. And he was unable to offer an alternative hypothesis for the verdict excluding the accused's nonparticipation in the holdup, an understandable difficulty.

Here, the act-offense dichotomy threatens consequences far more serious than the possible cumulation of consecutive terms of imprisonment where, it has been suggested, injustice from the "manipulation of a single fact situation" is remediable either by the sentencing judge or the pardoning power. See Mr. Kirchheimer's *The Act, the Offense and Double Jeopardy*, 58 *Yale Law Journal* 513 (1949). By the fourth indictment, the accused was placed on trial and convicted for the same act or transaction of which, as a necessary consequence, he had been exonerated by the verdict and judgment of acquittal on the earlier indictments.

[fol. 153] As contended by counsel for the accused, robbery consists of an assault and a taking; and here the assaults were simultaneous, the putting in fear was but a single act or offense operating alike upon all the victims

of the felonious endeavor at the same time, and a second prosecution would contravene the double jeopardy clause of the State Constitution, *Article* I, *paragraph* 11, and the ancient principle of the common law that one may not be twice put in jeopardy for the same offense. The accused had been acquitted of the basic act of the robbery, the act without which the indictment for armed robbery is not maintainable.

Chitty affirmed that the pleas of *autrefois acquit* and *autrefois convict* depend on the principle that "no man shall be placed in peril of legal penalties more than once upon the same accusation. * * * It is not, in all cases, necessary that the two charges should be precisely the same in point of degree, for it is sufficient if an acquittal of the one will show that the defendant could not have been guilty of the other." 1 *Chitty Cr. L.* 452, 462. And Cockburn, C. J., said in *R.* v. *Elrington*, 31 *L.J.* 14 *M.C.*: "It is a fundamental principle that out of the same state of facts a series of prosecutions is not to be allowed."

Such is the rationale of our own cases. Where the "fact prosecuted" is the same in both prosecutions, though the offenses differ "in coloring and degree," there is prior jeopardy. *State* v. *Cooper*, 13 *N.J.L.* 361 (*Sup. Ct.* 1833). Justice Drake there referred to the protection against multiple prosecutions for crime as a "great principle" of the common law forming "one of the strong bulwarks of liberty," whose prostration would subject the citizen, "if guilty of an offense, to the unnecessary costs and vexations of repeated prosecutions, and if innocent, not only to those, but to the danger of an erroneous conviction from re- [fol. 154] peated trials." He continued: "If in civil cases, the law abhors a multiplicity of suits, it is yet more watchful in criminal cases, that the crown shall not oppress the subject, or the government the citizen, by unnecessary prosecutions." The doctrine has its roots in natural justice, to shield the freeman from the oppression and persecutions of arbitrary government, a limitation upon absolute power confirmed by King John's Magna Charta of 1215, in the provision (c. 29) securing the essentials of individual right and justice and the ancient liberties of the freeman against interference "but by lawful judgment of his peers, or by the law of the land." *State* v. *Labato*, 7 *N.J.*

137 (1951). The inquiry is "whether or not the offenses grew out of the same transaction or were the product of a single act." *State* v. *Mowser*, 92 *N.J.L.* 474 (*E. & A.* 1919, Kalisch, J. See *State* v. *Cosgrove*, 103 *N.J.L.* 412 (*E. & A.* 1927); *State* v. *Pennsylvania Railroad Co.*, 9 *N.J.* 194 (1952). I perceive no distinction in principle between these cases and the case at bar. A prosecution "for any part of a single crime bars any further prosecution based on the whole or part of that crime." *State* v. *Shannon*, 113 *Me.* 127, 3 *Atl.* 2d 899 (*Sup. Jud. Ct.* 1939), 120 *A.L.R.* 1116. There is in such circumstances the identity of offenses which brings the principle into operation. If not guilty of the felonious act laid to the accused in the earlier indictments, he could not be guilty of the offense charged in the later indictment.

In mitigation of the rigor of the "same evidence" rule denying double jeopardy where the second charge is so formulated as to be susceptible of proof by different evidentiary facts, the "same transaction" test has been given recognition in the English cases. See, *e.g.*, *Wemyss* v. *Hopkins*, 10 *Q.B.* 378, 381 (1875), where a conviction on a complaint alleging damage to a person by "negligence or wilful misbehaviour," *i.e.* by "striking a certain horse ridden" by the complainant, was held to bar a second com-[fol. 155] plaint for assault under another statute as a proceeding involving the "same identical matter." Blackburn, J. said: "The defense does not arise on a plea of *autrefois convict*, but on the well-established rule at common law, that where a person has been convicted and punished for an offence by a Court of competent jurisdiction, *transit in rem judicatum*, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence." Whether there be a conviction or an acquittal, the accused cannot be twice vexed for the same cause.

In *People* v. *Israel*, 269 *Ill.* 284, 109 *N.E.* 969 (*Sup. Ct.* 1915), where goods belonging to different owners were stolen from the same building at the same time, it was held, on a question of duplicity in criminal pleading, that there was but "a single offense against the public. * * * Where

the offense is one act, fully completed at the same time and place, it is but one crime, however many different kinds of property may be stolen." A distinction was made between an offense committed against the public and wrongs against private citizens as the separate owners of the stolen property. "As against the public," it was affirmed, "such an act is but one offense or crime," although "there are as many wrongs committed against private citizens as there are separate owners."

And in *People* v. *Perrello*, 350 *Ill.* 231, 182 *N.E.* 748 (*Sup. Ct.* 1932), where several individuals were robbed at the same time in a holdup of a social gathering, the conclusion was that the whole transaction constituted but one offense and could be prosecuted as such. The propriety of joinder was the issue raised there; and the court distinguished such criminal conduct from separate offenses "not parts of one and the same transaction," but "sepa- [fol. 156] rate and distinct in law and in fact," a differentiation that on principle would seem to hold good where *res judicata* is concerned. See *People* v. *Brooklyn & Queens Transit Corporation*, 283 *N.Y.* 484, 28 *N.E.* 2d 925 (*Ct. of App.* 1940), holding that an acquittal on a charge of maintaining a public nuisance prior to a given day is not a bar to the prosecution of a charge of maintaining a nuisance thereafter, "yet it may in proper case constitute an adjudication of an issue of fact or of law necessarily determined by the earlier judgment * * *."

The "same evidence" test derived from *Rex* v. *Vandercomb*, 2 *Leach* 708, 168 *Eng. Rep.* 455 (1796), Buller, J., designed to allow a new proceeding against one acquitted because of variance between allegation and proof, does not serve the basic principle of protection against arbitrary action in the field of multiple prosecutions for the one act or offense. See Kirchheimer's *The Act, the Offense, and Double Jeopardy*, *supra*; *Note*, 24 *Minn. L. Rev.* 522, 550-558 (1940). Apropos of this, Professor Lugar has said in a recent article, *Criminal Law, Double Jeopardy and Res Judicata*, 39 *Iowa L. Rev.* 317 (1954), at *p.* 347: "Not until the prosecutor is required to use in one case all of the operative facts, known or discoverable by him, arising from essentially one criminal act of the accused, or be forever

barred from using any of them in future prosecutions will the accused be protected from undue harassment."

And while the rule of former jeopardy has reference to criminal prosecutions only, the pleas of former conviction and acquittal involve also the principle of *res judicata* or, as it is sometimes termed, "estoppel by judgment," "estoppel by verdict," or "collateral estoppel." *Res judicata* is a species of estoppel. Where the second action between the same parties is upon a different cause or demand, the judgment in the prior action operates as an estoppel, not as to [fol. 157] matters which might have been litigated and determined, but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Commissioner of Internal Revenue* v. *Sunnen*, 333 *U.S.* 591, 68 *S. Ct.* 715, 92 *L. ed.* 898 (1948); *Partmar Corporation* v. *Paramount Theatres Corporation*, 349 *U.S.* 89, 74 *S. Ct.* 414, 98 *L. ed.* 542 (1954). The one precludes the relitigation of particular causes of action; the other precludes the relitigation of particular facts and issues. See *United States* v. *International Building Co.*, 345 *U.S.* 502, 73 *S. Ct.* 807, 97 *L. ed.* 1182 (1953). The successful maintenance of a second action on a different cause of action may be precluded by a prior conclusive adjudication of a particular issue involved in both actions. *United Shoe Machinery Corporation* v. *United States*, 258 *U.S.* 451, 42 *S. Ct.* 363, 66 *L. ed.* 708 (1922). In determining whether the second action is for the same cause of action, the inquiry is whether there is the identity of facts essential to their maintenance, or whether the same evidence would sustain both, *i.e.* the "same evidence" rule. *Meirick* v. *Wittemann Lewis Aircraft Co.*, 98 *N.J.L.* 531 (*E. & A.* (1923). See *United States* v. *The Haytian Republic*, 154 *U.S.* 118, 14 *S. Ct.* 992, 38 *L. ed.* 930 (1894). But such is not the test of collateral estoppel, although the basic principle is the same. *Hancock, Comptroller*, v. *Singer Mfg. Co.*, 62 *N.J.L.* 289 (*E. & A.* 1898); *Tait* v. *Western Maryland R. Co.*, 289 *U.S.* 620, 53 *S. Ct.* 706, 77 *L. ed.* 1405 (1933).

We are dealing with a principle of universal jurisprudence, grounded as it is in the essential justice of putting an end to litigation in the interest of the individual litigants and the public as well. In civil cases at common law

the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause. *Nemo debet bis vexari pro (una et) eadem causa.* In this class of case [fol. 158] the plea of a former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action; and the rule is the same where the ultimate issuable fact has been determined by judgment in a proceeding between the parties. *Ex parte Lange*, 18 *Wall.* 863, 21 *L. ed.* 872 (1874). As Justice Drake said in *State* v. *Cooper, supra,* this is *a fortiori* the rule in criminal cases also, to secure the subject and the citizen from the oppression of unnecessary prosecutions.

The principle qualifies the "same evidence" test in double jeopardy cases, just as the "necessarily included offense" concept modifies the same evidence formula to secure the cherished basic liberty of immunity from repeated jeopardy. See *State v. Cosgrove, supra.* We are concerned here with the quality of finality inherent in criminal judgments.

In *United States* v. *Oppenheimer*, 242 *U.S.* 85, 37 *S. Ct.* 68, 61 *L. ed.* 161 (1916), Justice Holmes adopted this declaration of Hawkins, J. in *Reg.* v. *Miles*, *L.R.* 24 *Q.B. Div.* 423, 431: "Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, the adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. * * *. In this respect the criminal law is in unison with that which prevails in civil proceedings." He continued: "It cannot be that the safeguards of the person, so often and so rightfully mentioned with solemn reverence, are less than those that protect from a liability in debt. * * *. The finality of a previous adjudication as to the matters determined by it, is the ground of decision in *Com.* v. *Evans*, 101 *Mass.* 25, the criminal and civil law agreeing, as Mr. Justice Hawkins says."

[fol. 159] And though, with some exceptions, one may be prosecuted in the Federal jurisdiction for the commission of a substantive offense and a corspiracy to commit it, "*res judicata* may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings, * *

and operates to conclude those matters in issue which the verdict determined though the offenses be different." *Scalfon* v. *United States*, 332 *U.S.* 575, 68 *S. Ct.* 237, 92 *L. ed.* 180 (1948). There, the court considered the facts adduced at each trial, and the instructions given the jury on the first trial, in determining whether the jury's verdict in the conspracy trial resolved in favor of the petitioner the facts essential to conviction of the substantive offense; and the conclusion was that the earlier verdict precluded a later conviction of the substantive offense. Said Justice Douglas: "It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial. That the prosecution may not do."

The general doctrine of estoppel "is as applicable to the decisions of criminal courts as to those of civil jurisdiction. * * *" In the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment;" what was decided by the criminal judgment is to be had by an "examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts." There, the holding was that a prior criminal conviction may work an estoppel in favor of the government in a subsequent civil proceeding. *Emich Motors Corp.* v. *General Motors Corp.*, 340 *U.S.* 558, 71 *S. Ct.* 408, 95 *L. ed.* 534 (1951). See *Note*, 24 *Minn. L. Rev.* 522, 558.

See also *United States* v. *De Angelo*, 138 *F.* 2d 466 (*C.C.A.* 3rd 1943); *Adkins* v. *Commonwealth of Virginia*, 175 *Va.* [fol. 160] 590, 9 *N.E.* 2d 349 (*Sup. Ct.* 1940).

*Harris* v. *State*, 113 Ga. 109, 17 *S.E.* 2d 573 (*Sup. Ct.* 1941), is directly in point. There, the defendant, acquitted of murder, was later convicted of the robbery out of which the killing arose. Holding that the two crimes were not the same offense under Georgia law, the Georgia Supreme Court reversed the conviction as ill founded since the sole issue at the earlier trial was the identity of the defendant. This court reasoned thus: "In the former trial for murder there was not the slightest pretense of justification on the part of the defendant. The whole contention in that case centered upon the single question whether the defendant

participated with another in the murder and robbery of the deceased. If he did, he was necessarily guilty of murder. By acquitting him, the jury necessarily found that he did not participate in the transaction. This was the sole issue that was tried and determined. It is now sought, after such a solemn determination, to test again the same issue, and to undo the necessary effect of the former judgment by adjudicating that the defendant did in fact participate in the robbery and murder, from which the jury has already absolved him. Since it undisputably appears that the defendant could not be guilty of the present charge without also being guilty of the crime of which he has been tried and acquitted, he cannot now be put in jeopardy for the purpose of again adjudicating the issue which has already been determined in his favor."

The verdict and judgment of acquittal on the earlier indictments of necessity presupposes the nonparticipation of the accused in the armed robbery of Yager. The verdict of acquittal could not have been reached otherwise; the accused's exculpation of all complicity in the holdup is indubitably a part of the thing adjudged, and so it is conclusion of the ultimate issuable fact of guilt. Unless this be so, [fol. 161] then the citizen in such circumstance is subject to successive prosecutions until a convicting jury is found.

I would reverse the judgment and direct a dismissal of the indictment.

Mr. Justice Jacobs and Mr. Justice Brennan join in this opinion.

---

[fol. 162] SUPREME COURT OF NEW JERSEY

STATE OF NEW JERSEY, Plaintiff-Respondent,

vs.

WILLIAM HOAG, Defendant-Appellant

MANDATE ON AFFIRMANCE—May 14, 1956

This cause having been duly argued before this Court by Mr. Robert E. Knowlton, counsel for the appellant and Mr. William J. Arnold, Counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Appellate Division, Superior Court is affirmed; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Appellate Division, Superior Court to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 14th day of May, 1956.

John H. Gildea, Clerk of the Supreme Court.

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[fol. 163] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 164] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 61 Misc

WILLIAM HOAG, Petitioner,

vs.

THE STATE OF NEW JERSEY

On petition for writ of Certiorari to the Supreme Court of the State of New Jersey.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—NOVEMBER 13, 1956

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted and the case is transferred to

the appellate docket as No. 567. One hour and a half is allowed for argument in this case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Brennan took no part in the consideration or decision of this application.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 — 432094 — 14

Office - Supreme Court, U.S.
FILED
AUG 12 1957
JOHN T. FEY, Clerk

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1957**

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## No. 40

---

WILLIAM HOAG,

*Petitioner,*

*vs.*

THE STATE OF NEW JERSEY,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW JERSEY

---

## BRIEF FOR PETITIONER

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# INDEX

## SUBJECT INDEX

BRIEF FOR PETITIONER:


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statute and Rules Involved | 3 |
| Statement | 4 |
| Specification of Errors | 7 |
| Summary of Argument | 7 |
| Argument | |
| I. A Second Trial Deprives a Defendant of Due Process of Law Where, Under the Circumstances, It Violates a Sense of Fundamental Justice | 10 |
| II. Defendant's Acquittal in the First Trial Determined that He Was Not a Participant in the Robbery Alleged in the Second Trial, as All Indictments Alleged the Same Transaction, and Identity Was the Only Controverted Issue in the First Trial | 11 |
| III. The Trial and Conviction of October 18 and 19, 1954, Under the Circumstances, Denied Petitioner of His Right to Due Process of Law | 15 |
| A. A conviction, after a prior acquittal upon the same evidence and issue, is not a reliable finding of guilt | 16 |
| B. The trial and conviction of petitioner is a violation of the principles underlying his right to a fair trial | 17 |
| C. Well established principles of justice would preclude relitigation between the same parties in a civil suit | 19 |
| D. The trial and conviction of petitioner violated the fundamental principles underlying the constitutional ban against multiple trials | 21 |

Page

The trial in this case violates both of the basic policies underlying the ban against repeated trials ..... 22
The prohibition against retrying the same fact is the rationalizing principle in other types of double jeopardy cases ..... 26

E. The second trial, in addition, deprived petitioner of his constitutionally protected right to a speedy trial ..... 29

Conclusion ..... 31
Appendix ..... 33

## Citations

Cases:

*Ajamian* v. *Schlanger*, 14 N.J. 483, 103 A. 2d 9 .... 20
*Betts* v. *Brady*, 316 U.S. 455 ..... 17
*Brock* v. *North Carolina*, 344 U.S. 424 .....11, 18, 22
*Brown* v. *Mississippi*, 297 U.S. 278 ..... 10
*Dotterweich* v. *United States*, 320 U.S. 277 ..... 17
*Driver's Union* v. *Meadowmoor*, 312 U.S. 287 .... 11
*Dunn* v. *United States*, 284 U.S. 390 ..... 17
*Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 ..... 13, 25
*Ex Parte Trull*, 133 Kan. 165, 298 Pac. 775 ..... 30
*Fay* v. *New York*, 332 U.S. 261 ..... 11
*Fayerweather* v. *Ritch*, 195 U.S. 276 ..... 13
*Grafton* v. *United States*, 206 U.S. 333 .....22, 26, 27
*Harding* v. *Harding*, 352 Ill. 417, 186 N.E. 152 .... 21
*Harris* v. *State*, 113 Ga. 109, 17 S.E. 2d 573 ..... 25, 26
*Hibdon* v. *United States*, 204 F. 2d 834 (6th Cir.) 16
*Leland* v. *Oregon*, 343 U.S. 790 ..... 16
*Mooney* v. *Holohan*, 294 U.S. 103 ..... 17
*Niemotko* v. *Maryland*, 340 U.S. 268 ..... 11
*Oyama* v. *California*, 332 U.S. 633 ..... 11
*Palko* v. *Connecticut*, 302 U.S. 319 .....7, 10, 14, 16, 18
*Palmer* v. *Ashe*, 342 U.S. 134 ..... 17
*People* v. *Beltran*, 94 Cal. 2d 197, 210 P. 2d 238 26
*People* v. *Prosser*, 309 N.Y. 353, 130 N.E. 2d 891 30

Page

*People* v. *Grzesczak*, 77 Misc. Rep. 202, 137 N.Y. Supp. 538 ..... 16, 26
*People* v. *Rodgers*, 102 Misc. 437, 170 N.Y. Supp. 86, aff'd 184 App. Div. 461, 171 N.Y. Supp. 451, aff'd 226 N.Y. 671, 123 N.E. 882 ..... 24, 25
*Plumber's Union* v. *Graham*, 345 U.S. 192 ..... 11
*Powell* v. *Alabama*, 287 U.S. 45 ..... 17
*Reid* v. *Covert*, 354 U.S. 1 ..... 19
*Sealfon* v. *United States*, 332 U.S. 575 .....13, 25, 26, 31
*Snyder* v. *Massachusetts*, 291 U.S. 97 ..... 10
*State* v. *Barton*, 5 Wash. 2d 234, 105 P. 2d 63 .... 24, 25
*State* v. *Cooper*, 13 N.J.L. 361 (Sup. Ct.) .....9, 19, 22
*State* v. *Dewey*, 206 Ore. 496, 292 P. 2d 799 ..... 26
*State* v. *Evjue*, 254 Wis. 581, 37 N.W. 2d 50 ..... 27
*State* v. *Hopkins*, 68 Mont. 504, 219 Pac. 1106 .... 17
*State* v. *Labato*, 7 N.J. 137, 80 A. 2d 617 ..... 22, 27
*State* v. *Locklear*, 16 N.J. 232, 108 A. 2d 436 ..... 28
*State* v. *McDonald*, 89 N.J.L. 421 (Sup. Ct.); aff'd 91 N.J.L. 233 (E. & A.) ..... 12
*Tot* v. *United States*, 319 U.S. 463 ..... 16
*Tumey* v. *Ohio*, 273 U.S. 510 ..... 17
*United States* v. *Chase*, 135 F. Supp. 230 (N.D. Ill. E.D.) ..... 30, 31
*United States* v. *De Angelo*, 138 F. 2d 466 (3rd Cir.) ..... 26
*United States* v. *Oppenheimer*, 242 U.S. 85 ..... 20, 21
*United States* v. *Provoo*, 17 F.R.D. 183 (D.C. Md.) ..... 30, 31
*United States* v. *Simon*, 225 F. 2d 260 (3rd Cir.) 25
*United States ex rel Almeida* v. *Baldi*, 195 F. 2d 815 (3rd Cir.) ..... 17
*Watts* v. *Indiana*, 338 U.S. 49 ..... 11, 14
*Williamson* v. *Columbia Gas & Electric Corp.*, 186 F. 2d 464 (3rd Cir.) ..... 20

STATUTES AND RULES:

New Jersey Stat. Ann. 2:166-1 ..... 33
New Jersey Rule 2:4-15 ..... 15, 33
New Jersey Rule 2:5-4 ..... 15, 33
28 U.S. Code, Sec. 1257 (3) ..... 2

Page

OTHER AUTHORITIES:


Clark, Code Pleading, Sections 19, 73 ..... 20
Comment, 34 Tex. L. Rev. 1091 ..... 30
Freeman, Judgments, Sec. 765 ..... 13, 20
Sec. 688 ..... 20
Holdsworth, History of English Law, Vol. 3, pp. 611, 614 ..... 21
Kirchheimer, The Act, the Offense and Double Jeopardy, 58 Yale L. J. 513 ..... 23
Lugar, Criminal Law, Double Jeopardy and Res Judicata, 39 Iowa L. Rev. 317 ..... 22, 23, 24
McCormick, Evidence, Sec. 321 ..... 16
Model Penal Code, Tent. Draft No. 5, 36-37 ..... 23
p. 35 ..... 23, 24
p. 48 ..... 28
Moore, Federal Practice, Sec. 2.06 ..... 20
Note, 7 Brooklyn L. Rev. 79 ..... 21
Note, 65 Harvard L. Rev. 818 ..... 24
Note, 24 Minn. L. Rev. 522 ..... 22
Note, 65 Yale L. J. 339 ..... 22, 23
Restatement of Judgments, Sec. 62, Comment f .. 20, 21
Sec. 68, Comment k .. 20
Slovenko, Double Jeopardy, 30 Tul. L. Rev. 409 19, 22

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1957**

---

## No. 40

---

WILLIAM HOAG,

*Petitioner,*

*vs.*

THE STATE OF NEW JERSEY,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW JERSEY

---

## BRIEF FOR PETITIONER

---

### Opinions Below

The opinion of the Supreme Court of New Jersey affirming, upon appeal, the conviction of petitioner appears at 21 N.J. 496, 122 A. 2d 628. The opinion is set forth in the record commencing at R. 200. The dissent starts at R. 208. The opinion of the Superior Court appears at 35 N.J. Super. 555, 114 A. 2d 573 (App. Div.) and is reproduced at R. 13.

## Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S. Code, Sec. 1257 (3), to review the final judgment of the Supreme Court of New Jersey rejecting petitioner's claim that he is imprisoned in violation of the due process clause of the Fourteenth Amendment. Petitioner's motion for leave to proceed *in forma pauperis* and his petition for certiorari were granted on November 13, 1956 (R. 219).

## Questions Presented

1. Does a verdict of acquittal show that the State failed to prove the defendant was one of the robbers when the defendant was acquitted after a trial in which:

(a) three indictments, each alleging the robbery of a different individual, arising out of the same transaction were joined for trial;

(b) each victim testified unequivocably and without contradiction to each of the elements of the crime against him, and this mutually corroborative testimony was fortified still further by the testimony of two additional witnesses as to the facts of the transaction;

(c) the issue of defendant's identity as one of the robbers was the only disputed fact at the trial and was also the only issue both common and conclusive upon all three indictments;

(d) the issue of identity was raised by the unequivocal statement of three of the State's five witnesses that defendant was not one of the robbers and by the refusal of a fourth to so identify him under oath, as well as by the defendant's testimony as to alibi; and,

(e) the jury acquittal was for each of the three indictments tried?

2. May a state court, consistently with the Fourteenth Amendment, try, convict and sentence an individual to 5-7 years for armed robbery where:

(a) the defendant had been acquitted upon three other indictments, joined for trial, arising out of the same criminal transaction;

(b) the State, although it knew from the day of the robbery that the victim named in the present indictment had been robbed, destroyed the possibility of joinder of all indictments for trial by failing to bring the present one until after the acquittal upon the first three;

(c) the acquittal at the first trial was based upon a determination that the defendant was not one of the robbers, and the victim named in the present indictment was robbed by the same men;

(d) the sole evidence identifying defendant as one of the robbers was the testimony of the victim whose testimony was not believed in the first trial; and,

(e) the trial occurred more than 29 months after the first trial, and over four years after the transaction, because the State, after the first trial, surrendered jurisdiction over the defendant by extraditing him to New York for incarceration?

## Statute and Rules Involved

The robbery statute in force at the time of the robbery is set forth in Appendix, p. 33. Also included in the Appendix, p. 33, are the New Jersey rules on joinder.

## Statement

**The first trial.**

On June 26, 1951, the Bergen County Grand Jury re turned three indictments against petitioner, William Hoa Each indictment alleged that on September 20, 1950, in th Borough of Fairview, New Jersey, petitioner, in conce with John Doe and Richard Roe, took property from specified individual by means of putting that person fear. A second count in each indictment charged the carr ing of a concealed weapon (R. 1-3).

These indictments were joined for trial and were trie on May 26 and 27, 1952 (R. 10). At this trial the Sta called five witnesses (R. 5). Three of these witnesses we the victims named in the indictments. The two other Sta witnesses were also victims of the robbery. One of the was Elmer Yager, the victim who was named in the four indictment, which was the subject of the second trial ( 4).

The testimony of these witnesses establishes, witho contradiction, that they all were in Gay's Tavern sometin after three o'clock on the afternoon of September 20, 195 and that a robbery took place at that time (R. 19-20; 4 51-52; 54; 57). It is equally well established that the were three robbers (R. 44; 54; 57-58) and that the victi were first required to line up against the wall and we then taken to another room where they were tied up ( 20-21; 44-45; 53; 54; 58). All witnesses, including the vi tims named in the indictments being tried, testified to t elements of robbery—i.e. that they were put in fear a that as a result of that fear, property was taken from the persons (R. 21; 44-45; 53; 54-55; 58). Consistent with t theory of a joint operation by three robbers as alleged the indictments, the witnesses referred to the robbers "they" without any attempt to specify that a given robb

did any particular act in relation to a specified victim—i.e. "they" lined the victims against the wall; "they" took the property and "they" tied up the victims (R. 20-21; 45; 53; 54; 58). The robbery statute involved specifically provided for the conviction of "aiders, procurers and abettors" (Appendix, p. 33) and it was clearly the theory of the State that the defendant, William Hoag, would be guilty if he was one of the three robbers who took part in the holdup.

The only disputed fact at this trial was the identification of petitioner as a participant. This was conceded upon argument before the Supreme Court of New Jersey herein (R. 210). Actually, three of the State's witnesses stated unequivocally that Hoag, the petitioner herein, was not one of the robbers (R. 46; 53; 55). A fourth witness stated on direct examination that he was not positive in his identification (R. 22) and upon cross-examination that he was not prepared to swear that Hoag was one of the robbers (R. 23). As a consequence, the only witness to identify Hoag was Elmer Yager (R. 58). The defendant, who did not call any other witnesses, testified that on September 20, 1950, he was at his mother-in-law's home (R. 89), that he had never been in Fairview, New Jersey (R. 92), that he had never been in Gay's Tavern (R. 92), and that he did not participate in the robbery of September 20, 1950 (R. 92). The jury acquitted upon all three indictments (R. 5-6).

**The second trial.**

Elmer Yager, the witness in the above trial, had filed a statement with the police on the day of the robbery (R. 157). In spite of its knowledge that Yager was a victim, the State did not return an indictment alleging the robbery from him until after the acquittal of May 27, 1952. On July 17, 1952, the Bergen County Grand Jury returned an in-

dictment which was the same as the first three in all respects except that this indictment alleged that Elmer S. Yager was robbed, and the description of the property taken was, of course, different (R. 4, 10). The State, however, after the first trial elected to extradite petitioner to New York for incarceration (R. 202). In addition, after return from New York, petitioner was incarcerated in the Bergen County Jail for five months awaiting trial (R. 189). As a result, trial upon the fourth indictment was delayed until October 18 and 19, 1954 (R. 10) which was over four years after the event and 29 months after the first trial.

At this second trial, the sole evidence that petitioner was one of the robbers was once again the testimony of Elmer S. Yager (R. 114). The State called no other witness except on rebuttal (R. 195). The defense called the other four witnesses who had testified for the State in the first trial. These witnesses once again stated either that petitioner was not one of the robbers (R. 137; 149; 151), or, that the witness could not make a positive identification (R. 143). Petitioner once again testified that he had never been in Fairview, New Jersey (R. 160-161) and that on September 20, 1950, he was in the midtown section of Manhattan with his mother-in-law (R. 162) who had died during the State induced delay between trials (R. 183).

The jury convicted petitioner of the robbery of Elmer S. Yager and of carrying a concealed weapon. Judgment and sentence upon this verdict were entered November 5, 1954 (R. 7). The petitioner was sentenced to 5-7 years for robbery and to a consecutive sentence of 1½-3 years for carrying a concealed weapon (R. 7). The sentence for carrying a concealed weapon was set aside December 17, 1954 (R. 8), because that count was barred by double jeopardy in that similar counts in the first trial had been dismissed (R. 10).

**Appellate Review.**

The defendant appealed as an indigent to the New Jersey Superior Court (R. 11). The case was heard upon a stipulated statement in lieu of record (R. 1-12) and the conviction was affirmed (R. 13), 35 N.J. Super. 555, 114 A. 2d 573 (App. Div. 1955). On appeal to the Supreme Court of New Jersey, that Court on its own motion ordered a transcript of the testimony at both the trials (R. 209-210). With the aforementioned stipulation and transcripts before it, that Court expressly denied defendant's claim that the trial, conviction and sentence herein deprived petitioner of his liberty without due process of law (R. 208).

## Specification of Errors

The Supreme Court of New Jersey erred:

1. In failing to conclude that the verdict of acquittal in the trial of May 26 and 27, 1952, was a result of the State's failure to identify petitioner as one of the robbers in the criminal transaction which gave rise to all four of the indictments involved herein.

2. In holding that the trial of October 18 and 19, 1954, and the conviction and sentence therein, did not deprive petitioner of his right to due process of law under the Fourteenth Amendment.

## Summary of Argument

A conviction obtained by multiple trials is a denial of due process where the second trial violates a sense of fundamental justice. *Palko* v. *Connecticut,* 302 U.S. 319.

The facts in the record show that the victims named in three indictments in the first trial and Elmer S. Yager, the victim alleged in the second trial, were robbed by the same three men. Five witnesses, including the three alleged

in the indictments being tried and Yager, testified without contradiction to the facts of the holdup and to each element of robbery in relation to the crime against them. Three, however, stated unequivocally that petitioner was not the robber and one said that he could not swear to such an identification; only Yager identified petitioner as a participant. Defendant testified as to alibi. The State conceded before the New Jersey Supreme Court that the sole issue was petitioner's identity as one of the robbers. The jury acquitted on all three indictments.

At the second trial the only litigated issue was petitioner's participation, and the only evidence connecting him with the crime was once again Yager's testimony. Manifestly, the second trial was a resubmission of the same evidence upon the same issue which the first jury had decided against the State.

The State knew from the day of the holdup that Yager, the victim alleged in the second trial, had been robbed. As a result of the State's not indicting for his robbery, the possibility of joinder of all of the indictments was destroyed, and the second trial was delayed for 29 months.

Petitioner's conviction, which is based upon evidence so inherently weak that it has failed to convince 12 out of the 24 jurors who heard it, violates the principles underlying the requirement that the state must prove guilt beyond a reasonable doubt before it may deprive an individual of his liberty.

The trial and conviction destroys the principles underlying petitioner's right to a fair trial. A second trial of the same issue previously decided adversely to the state is inherently unfair because of the harassment by the dominant power of the state. More important, both the right to a fair trial and the right to a jury trial lose their value

as safeguards against erroneous conviction if the State is not bound by the findings in the first trial.

Universally accepted principles of *res judicata* and collateral estoppel would have prohibited a second trial in a civil suit. These fundamental principles of justice in civil cases are even more necessary in criminal prosecutions because of the disparity of resources of the parties, the greater emotional strain, the imprisonment awaiting trial if bail cannot be raised, and the more severe consequences of an erroneous decision.

Protection against multiple prosecutions has been recognized since early English law and is universally accepted today, usually in constitutional form. Essentially, two policies are involved:—prevention of harassment and prevention of erroneous convictions. *State* v. *Cooper*, 13 N.J.L. 361 (Sup. Ct.). The second policy is the rationalizing principle in many types of cases arising under the double jeopardy provisions. For instance, a man may not be prosecuted for the murder of A after an acquittal for the manslaughter of the same man; the state may not appeal, even in states having statutes allowing such appeals, the factual findings in the absence of legal error; nor may the state cause an unnecessary termination of the proceedings prior to verdict.

Petitioner's conviction violates both the policy against harassment and the policy against relitigation of the same fact. These are fundamental safeguards which are basic to our concept of a free society. Their nature is the same whether protection is provided by a broad definition of "offense" under the constitutional provisions or a realistic approach to collateral estoppel.

It is apparent that the State of New Jersey should not be allowed to evade these basic rights of an individual by

applying a combination of restrictive tests for determining the "same offense" and by refusing to go beyond the generality of the first verdict when its basis is so obvious.

The second trial is made even more shocking by the fact that the State delayed it for 29 months. The right to a speedy trial is an important part of the right to a fair trial which the state cannot arbitrarily destroy.

In conclusion, therefore, it may be seen that the refusal of the New Jersey Supreme Court to accept the obvious finding of the first jury has resulted in the destruction of principles underlying petitioner's right to be proved guilty beyond a reasonable doubt, his right to a fair trial, his right to a jury trial, his protection against harassment and retrial of the same fact, and his right to a speedy trial. Such a conviction shocks a fundamental sense of justice and is a denial of due process.

## ARGUMENT

### I

### A Second Trial Deprives a Defendant of Due Process of Law Where, Under the Circumstances, It Violates a Sense of Fundamental Justice.

This Court will not allow a state conviction to stand if obtained in a manner which "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105; *Brown* v. *Mississippi*, 297 U.S. 278, 285. The opinion in *Palko* v. *Connecticut*, 302 U.S. 319, which was the first pronouncement by this Court upon the relationship between multiple trials and due process, relied upon this as the "rationalizing principle" of the due process cases. 302 U.S. at 325.

The opinion in *Brock* v. *North Carolina*, 344 U.S. 424, the latest case decided by this Court in which the state had two trials, applied this principle. The opinion stated that "the pattern of due process is picked out in the facts and circumstances of each case." 344 U.S. at 427-428.

## II

**Defendant's Acquittal in the First Trial Determined that He Was Not a Participant in the Robbery Alleged in the Second Trial, as All Indictments Alleged the Same Transaction, and Identity Was the Only Controverted Issue in the First Trial.**

This Court has the power to examine the uncontroverted facts in the record and to draw its own conclusions therefrom where such conclusions have constitutional significance. *Fay* v. *New York*, 332 U.S. 261, 272; *Niemotko* v. *Maryland*, 340 U.S. 268, 271; *Plumber's Union* v. *Graham*, 345 U.S. 192, 197. The exercise of this power is necessary to determine if constitutional rights "have been denied in substance and effect" (*Oyama* v. *California*, 332 U.S. 633, 636) or are being defeated by "insubstantial findings of fact screening reality" (*Driver's Union* v. *Meadowmoor*, 312 U.S. 287, 293). The exercise of this power is particularly important in due process cases. *Watts* v. *Indiana*, 338 U.S. 49, 51.

The record shows that the victims in all four indictments were robbed at the same place and during the same transaction. Three men held up Gay's Tavern on September 20, 1950. The victims alleged at the first trial and Elmer Yager, the victim alleged at the second trial, were robbed in that holdup. The State admitted this by offering Yager's testimony in the first trial, for his testimony would otherwise be irrelevant. The trial judge recognized this in the first case, for he refused to dismiss the robbery charges

even though the only identification of petitioner was Yager's testimony (R. 87). The trial judge in the second trial also recognized this by correcting his sentence in that he set aside the consecutive sentence for carrying a concealed weapon (R. 8) because it was barred by the prior acquittal on similar counts in the first trial (R. 10). It is, therefore, clear that the same men who robbed the victims named in the indictments tried on May 26 and 27, 1952, also robbed Yager at the same time and place.

The State conceded before the New Jersey Supreme Court that the only litigated fact in the first trial was petitioner's participation in the robbery (R. 210).

The facts of the record are even stronger than the admission. Three indictments were joined for trial. Each indictment was supported by the unequivocal and uncontradicted statement by the victim named therein that he was put in fear (R. 21; 53; 55) and, as result, property was taken from his person (R. 21; 53; 54). These were the elements of the robbery alleged in the indictments (R. 1-3) and necessary for conviction under the statute (A. 33); *State* v. *McDonald,* 89 N.J.L. 421 (Sup. Ct.); affirmed 91 N.J.L. 233 (E. & A.), cited by the Superior Court in this case at R. 16. The testimony of each individual was corroborated by the equally unequivocal and uncontradicted testimony of four other victims. To have acquitted upon each of the three indictments, the jury would have had to discredit the testimony of each of the victims named in the indictments. The jury must have believed that each of the named victims and each of the corroborating witnesses, including Yager, was robbed during a holdup at Gay's Tavern on September 20, 1950. There was no evidence to the contrary.

The only issue common and conclusive to all three indictments was the participation of petitioner in the holdup.

Nor was this issue raised solely by his testimony of alibi. Of the State's five witnesses only Elmer S. Yager identified petitioner as a participant (R. 58) while three stated definitely that he was not (R. 46; 53; 55) and a fourth stated he could not swear to such an identification (R. 23).

The New Jersey Supreme Court, on the basis of the above record, said that the general verdict of not guilty did not establish the defendant's alibi (R. 207). Of course, the petitioner's contention before that Court and here is not that the verdict established that he was at his mother-in-law's home (though that evidence was uncontroverted except by the testimony of Yager), but that wherever he was, he was not at Gay's Tavern at the time of the robbery.

The view that the generality of a criminal verdict precludes the ascertainment of its basis was twice rejected by this Court in unanimous opinions. *Sealfon* v. *United States*, 332 U.S. 575; *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558. The significance of the verdict must be determined from a study of what took place at the trial in which it was rendered. *Sealfon* v. *United States*, *supra*; *Emich Motors Corp.* v. *General Motors Corp.*, *supra*. This is true in civil proceedings as well. *Fayerweather* v. *Ritch*, 195 U.S. 276, 307; 2 Freeman, Judgments, Sec. 765 (5th ed.). The conclusion as to the basis of a verdict is a question for the judge. *Emich Motors Corp.* v. *General Motors Corp.*, *supra*.

In petitioner's case the elements of the crime—e.g. the taking from the person by force or fear, are not in dispute. It has been shown by the record that these facts were proved overwhelmingly without any evidence to the contrary. It has been admitted by the State that there was no dispute at the trial as to the robbery of the named victims (R. 210). The sole disputed issue was petitioner's participation in the holdup of September 20, 1950, in Gay's Tavern.

At the second trial, Yager, the victim named in the indictment being tried, once again identified petitioner as one of the robbers in that same holdup. Once again his testimony was the sole evidence for the State on this issue. Once again petitioner testified as to alibi and this time the other four victims testified for defendant. Three stated petitioner was not one of the robbers and the fourth, once again, would not swear that he was.

In determining whether the second trial violates the due process clause, it is important to determine whether the state is attempting to retry an issue which was determined adversely to it in a prior decision on the merits. Cf. *Palko* v. *Connecticut,* 302 U.S. 319, 328. This question in a case such as this depends upon what issues were determined by the first acquittal.

The conclusion as to the meaning of the acquittal, based upon the uncontradicted facts, has constitutional significance and is for this Court to draw. *Watts* v. *Indiana,* 338 U.S. 49, 51. Any other procedure would allow the state to deny the defendant his rights in substance and effect, by insubstantial findings screening reality.

Justice Heher, in his dissent, which was joined in by Justice Brennan and Justice Jacobs, stated "there can be no doubt, I submit, of the issue submitted to the jury and the fact upon which the exculpatory verdict turned—i.e. the accused's participation in a holdup that was a conceded fact" (R. 209).

The petitioner, therefore, contends that it is manifest that the second trial in this case is an attempt by the State to overcome the adverse finding of the first jury upon an issue that is conclusive in both trials, by simply trying the same issue and the same evidence to another jury.

## III

**The Trial and Conviction of October 18 and 19, 1954, Under the Circumstances, Denied Petitioner of His Right to Due Process of Law.**

The State knew from September 20, 1950, that Elmer S. Yager had been robbed (R. 157). However, no indictment for the robbery from his person was returned until July 17, 1952 (R. 10). This delay destroyed the possibility of settling the entire controversy against petitioner in one trial. The joinder of three indictments for the trial of May 26 and 27, 1952, shows that under New Jersey procedures, settlement in one trial was possible. Rule 2:4-15, now R.R. 3:4-7; Rule 2:5-4, now R.R. 3:5-6. These rules are set forth in the Appendix, p. 33.

The second trial, which was thus caused by the State, was based upon the fourth indictment to arise out of this one criminal transaction. The second trial was a relitigation of the question of defendant's participation in the robbery. Since Elmer S. Yager once again was the sole witness to identify the petitioner as one of the robbers, the second trial was not based upon any new evidence discovered after the first trial. It was an obvious attempt to overcome the first jury's finding by submitting the same evidence upon the same issue to another jury. The State on this trial, of course, knew from experience not to call eye-witnesses who had disappointed them in the first trial and, also, knew exactly how the defendant would testify. It is also significant that petitioner, an indigent who was unable to raise bail, was confined to the Bergen County Jail for five months while awaiting the trial of October 18 and 19, 1954 (R. 189) in spite of the first jury's determination that he was not one of the robbers in this transaction. The second trial was not an attempt by the State to obtain a "trial free from the corrosion of substantial

legal error", for it had had that in the first trial; it was an attempt "to wear out the accused by a multitude of cases with accumulated trials." *Palko* v. *Connecticut*, 302 U.S. 319, 328.

**A. A conviction, after a prior acquittal upon the same evidence and issue, is not a reliable finding of guilt.**

In Anglo-American society, where liberty is considered one of our most prized possessions, it has been universally accepted that the state is not justified in depriving an individual of his liberty unless guilt is shown with a high degree of certainty. The stigma of a criminal conviction and the deprivation of liberty following such a conviction have led to the requirement that the state prove a defendant guilty beyond a reasonable doubt. McCormick, Evidence, Sec. 321. As a result, it has been held to be a violation of due process to create a presumption in a criminal trial when it is not based upon a reasonable inference (*Tot* v. *United States*, 319 U.S. 463) or to accept less than a unanimous verdict of guilty. *Hibdon* v. *United States*, 204 F. 2d 834 (6th Cir.). The requirement of proof beyond a reasonable doubt has been described by Justice Frankfurter, dissenting in *Leland* v. *Oregon*, 343 U.S. 790, 803, as being "basic in our law and rightly one of the boasts of a free society" and as a "requirement and a safeguard of due process of law in the historic, procedural content of 'due process'."

Elmer S. Yager testified in the first trial as to petitioner's identity and was not believed. Nevertheless, petitioner is now undergoing incarceration of from five to seven years for a conviction based solely upon that same witness's previously unacceptable testimony. The dilemma was well stated in *People* v. *Grzesczak*, 77 Misc. Rep. 202, 137 N.Y. Supp. 538, in which relitigation of identity was not allowed

because "we would be confronted with two incompatible verdicts, which would amount to a finding on one hand that the defendant was not present, and on the other hand that he was present." See also *State* v. *Hopkins*, 68 Mont. 504, 219 Pac. 1106 wherein it was said that testimony not believed in the first trial could not be believed in the second. A conviction based upon evidence so inherently weak that it fails to convince 12 out of the 24 jurors who heard it does not refute petitioner's claim of innocence nor prove guilt with the requisite degree of certainty to justify conviction and deprivation of liberty.

The fact that this conviction is a totally unreliable indicator of guilt is not undermined by those cases allowing inconsistent verdicts by one jury after one trial. *Dunn* v. *United States*, 284 U.S. 390; *Dotterweich* v. *United States*, 320 U.S. 277. While it may be true that juries will convict upon only one count of an indictment because of compromise or leniency, the jury in the trial of May 26 and 27, 1952, acquitted upon all three indictments. Such a verdict was not a compromise nor may it be assumed that the jury was so lacking in its sense of responsibility as to have allowed the petitioner to go entirely free because of leniency.

**B. The trial and conviction of petitioner is a violation of the principles underlying his right to a fair trial.**

The right to a fair trial is an integral part of due process. The hearing must be before an impartial judge (*Tumey* v. *Ohio*, 273 U.S. 510) and the defendant must have counsel if a trial without one is unfair (*Powell* v. *Alabama*, 287 U.S. 45; *Betts* v. *Brady*, 316 U.S. 455; *Palmer* v. *Ashe*, 342 U.S. 134). In addition, the prosecution cannot make the hearing a sham by the knowing use of perjured testimony (*Mooney* v. *Holohan*, 294 U.S. 103) or by the knowing withholding of relevant evidence. *United States ex rel. Almeida* v. *Baldi*, 195 F. 2d 815 (3rd Cir.).

The second trial was caused by the State's knowing failure to indict. It was the second trial arising out of a single criminal transaction and the sole factual issue involved had been previously decided adversely to the State. Additional trials caused by deliberate harassment by the state are inherently unfair. The additional economic and psychological strain, the additional imprisonment awaiting trial, and the advantages of experience gained from the prior trial all tend to give the dominant power of the state an unfair advantage.

In both *Palko* v. *Connecticut*, 302 U.S. 319, and *Brock* v. *North Carolina*, 344 U.S. 424, the second trial was necessary to obtain a decision upon the merits. In *Palko* v. *Connecticut, supra*, the first decision was vitiated by legal error while in *Brock* v. *North Carolina, supra*, the first trial ended without a decision upon the merits because of the unavailability of evidence. The right of the state to have a decision in the case may overbalance the burden of a second trial to the accused where the first trial ended without a valid decision upon the merits, but no such necessity is involved in this case.

Also, the defendant's position in the *Palko* case was different from petitioner's position in the present case. In the *Palko* case, the defendant knew that a decision free from legal error would terminate the proceedings. If petitioner's conviction is allowed to stand, however, a defendant who finds himself in a similar situation has no assurance that a decision will terminate his ordeal. So long as there are other victims, a decision favorable to the defendant may be nothing more than a signal for another indictment and another trial.

More significant, perhaps, is that the concept of a fair trial requires recognition of those things which were actually decided. The right to a fair trial is an individual's

most basic safeguard against erroneous conviction. This characteristic of the right is destroyed if a defendant may be required to submit the same issue and the same evidence for decision in a series of trials. Even if such successive determinations could each be considered fair, which they cannot, eventual conviction regardless of guilt is the almost inevitable conclusion. *State* v. *Cooper*, 13 N.J.L. 361, 370-1 (Sup. Ct.); Slovenko, Double Jeopardy, 30 Tul. L. Rev. 409.

The same observation may be made about defendant's right to a jury trial, which was recently described as "one of our most vital barriers to governmental arbitrariness." *Reid* v. *Covert*, 354 U.S. 1, 10. In a recent article by Professor Slovenko it was said that "it would be useless to insist on jury trials if one could be tried over and over again, for eventually conviction will result" (Slovenko, Double Jeopardy, 30 Tul. L. Rev. 409).

The shocking nature of this conviction is emphasized when it is realized that the necessity for two trials was occasioned by the State's failure to utilize existing joinder procedures; that the defendant has no equivalent right to avoid the consequences of an adverse decision by the simple expedient of trying the same issue over again to another jury; and, that such a power on the part of the State destroys many of the individual's most cherished rights such as the right to require proof beyond a reasonable doubt, the right to a fair trial and the right to a jury trial.

**C. Well established principles of justice would preclude relitigation between the same parties in a civil suit.**

Judge Goodrich has stated that "the meaning of 'cause of action' for *res judicata* purposes is much broader today than it was earlier" and that the purpose of the modern rule is to establish that "the whole controversy between the parties may and often must be brought before the same

court in the same action." *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F. 2d 464, 469-470 (3rd Cir.). To the same effect, see Justice Brennan in *Ajamian* v. *Schlanger*, 14 N.J. 483, 485, 103 A. 2d 9, 10; Clark, Code Pleading, Secs. 19, 73; Moore, Federal Practice, Sec. 2.06.

Comment f. to Sec. 62 of the Restatement of Judgments is directly in point in relation to a civil trial. It states:

> "Where there are a number of successive acts which are substantially simultaneous or which, although occurring over a considerable period of time, are all substantially of the same sort, public convenience and *fairness to the defendant* may require that they be dealt with in one proceeding. Thus, where in a series of rapidly successive acts a person breaks into the house of another, beats him and takes his chattels, a judgment based upon a claim for any one of these harms is a bar to a subsequent action." (Emphasis added)

The state prosecutes punish a wrong to society. Here the social effects arose out of the same transaction, so the analogy to the civil rule is directly in point.

In addition, this expanding concept of a cause of action has been supplemented by universal recognition of collateral estoppel in civil proceedings. 2 Freeman, Judgments, Sec. 688 (5th ed.). In civil cases, it is recognized that the determination of what was decided is based upon a study of the record. If the question still remains unanswered, evidence may be taken to decide it. 2 Freeman, Judgments, Sec. 765 (5th ed.); Restatement of Judgments, Sec. 68, comment k. Justice Holmes described the doctrine of *res judicata* in civil cases as a "fundamental principle of justice". *United States* v. *Oppenheimer*, 242 U.S. 85, 88. The "fundamental principle . . . is that justice and public

policy alike demand that a matter . . . which has been solemnly adjudicated . . . shall be deemed finally and conclusively settled in any subsequent litigation between the same parties where the same questions arise". *Harding* v. *Harding,* 352 Ill. 417, 186 N.E. 152, 156. The doctrine is required by considerations of fairness to the defendant. Restatement of Judgments, Sec. 62, comment f.

Justice Holmes also said that it could not be "that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from liability in debt". *United States* v. *Oppenheimer,* 242 U.S. 85, 87. These fundamental principles of justice are infinitely more essential in criminal trials than in civil suits. The overpowering resources of the state; the imprisonment awaiting trial if, like petitioner, a person cannot afford bail; the stigma of the trial; the threat to freedom which makes the psychological and emotional strain far greater in a criminal trial; and, the unwarranted interference with freedom involved in an erroneous conviction which will almost inevitably follow repeated trials of the same issue: all demonstrate the greater urgency of protection in criminal trials than in civil suits. These factors demonstrate that this universally recognized principle of justice in civil suits is a basic and essential principle of justice in criminal trials, and is, therefore, protected by the due process clause.

**D. The trial and conviction of petitioner violated the fundamental principles underlying the constitutional ban against multiple trials.**

The protection against multiple prosecutions goes back to early English law. 3 Holdsworth, History of English Law, 611, 614; Note, 7 Brooklyn L. Rev. 79. The Fifth Amendment to the United States Constitution and the constitutions of all but five states provide protection against

double jeopardy. Those five states have adopted the protection as fundamental common law. Vinson, Ch.J., dissenting *Brock* v. *North Carolina,* 344 U.S. 424, 435; Lugar, Criminal Law, Double Jeopardy and Res Judicata, 39 Iowa L. Rev. 317; Note, 24 Minn. L. Rev. 522, 523.

The reasons for the prohibition against multiple trials are twofold. The principle was characterized in *State* v. *Cooper,* 13 N.J.L. 361, 370-1 (Sup. Ct.) as "one of the strong bulwarks of liberty" which was necessary to protect individuals from "the unnecessary costs and vexations of repeated trials" and, in addition, to protect an innocent person from the risk "of an erroneous conviction from repeated trials." The first policy, therefore, is to prevent harassment by the state. This is essential because of the overpowering resources of the state, the stigma inherent in defending against criminal prosecutions, and the psychological strain which a defendant undergoes. The second policy is to prevent conviction of the innocent after a prior acquittal. This is based upon the realization that if a state can try the issue to enough juries, conviction is the almost inevitable consequence. Slovenko, Double Jeopardy, 30 Tulane L. Rev. 409. This policy is clearly applicable whenever the state attempts to litigate a second time an issue which has previously been decided adversely to it. The principle is the same whether or not the trials are for the same offense. *Grafton* v. *United States,* 206 U.S. 333; *State* v. *Labato,* 7 N.J. 137, 80 A. 2d 617.

**The trial in this case violates both of the basic policies underlying the ban against repeated trials.**

In early English law a prohibition against a second trial was effective in preventing the multiplication of suits arising out of one criminal transaction. Note, 65 Yale L. J. 339, 340-343. However, whether as a result of confusion between the problems of multiple trials and multiple pun-

ishment after one trial (Model Penal Code, Tent. Draft No. 5, pp. 36-37; Kirchheimer, The Act, the Offense and Double Jeopardy, 58 Yale L. J. 513, 514) or because of an attempt to counterbalance the then existent technical rules of criminal procedure which were favorable to the defendant (Kirchheimer, The Act, the Offense and Double Jeopardy, 58 Yale L. J. 513, 529; Lugar, Criminal Law, Double Jeopardy and Res Judicata, 39 Iowa L. Rev. 317, 319) the courts came to adopt extremely narrow tests for determining what was the "same offense". The weakness of these tests is "that they are so narrowly drawn as not to afford any real protection against cumulation of the number of prosecutions". Model Penal Code, Tent. Draft No. 5, p. 35; Lugar, *supra,* at 344; Note, 65 Yale L. J. 339.

The New Jersey Supreme Court applied two tests to petitioner's case. It held first that since the evidence necessary to convict for the robbery of Yager would not be sufficient to convict for the robbery of one of the victims named under the first three indictments, the same evidence test did not prohibit a second trial. In addition it was held that since robbery necessarily involved two acts—e.g. the putting in fear and the taking from the person, and the second act was necessarily personal to the victim named in the indictment, the same act test was likewise unavailing to the petitioner (R. 205). Neither of these tests protects the individual from harassment by multiple trials or from constant retrial of the same issue until the state is ultimately victorious. A single holdup may be tried as many times as there are victims even though the only issue is unaffected by the victim's identity and identical evidence is submitted upon the same issue in each trial. Also, neither test takes into account the factual context out of which the indictments arose, or what actually took place at the first trial. It is obvious why the comments to the Model

Code used the Superior Court's opinion in petitioner's case, which applied the same two tests, as the example of the inadequacy of the protection presently afforded the individual. Model Penal Code, Tent. Draft No. 5, p. 35.

The relationship between the fundamental policies underlying the constitutional provisions against double jeopardy, and a rule of collateral estoppel which delves beneath the general verdict to a common sense appraisal of the realities of the trial, is apparent. Either a definition of offense sufficiently broad to encompass all of the known criminal consequences of a criminal transaction (Lugar, Criminal Law, Double Jeopardy and Res Judicata, 39 Iowa L. Rev. 317, 347) must be adopted, or a realistic ban upon the retrial of the same fact must be established through collateral estoppel. Note, 65 Harvard L. Rev. 818, 874-875. Otherwise, a state may logically dissect one group of operative facts into a number of offenses and continue to try an individual upon the same issue until conviction, regardless of guilt, is achieved. It makes little difference to an individual which legal theory is utilized to preserve his fundamental rights when he is being overwhelmed by the power of the state.

Since the majority opinion in the New Jersey Supreme Court recognizes the applicability of collateral estoppel (R. 206-207), the precise difference between it and courts which have adopted a view of collateral estoppel based upon the facts of the first trial, is that the New Jersey Supreme Court circumvented the obvious finding of the first jury by hiding behind the generality of the verdict. In so doing, it relied upon two cases which do little to lend authority to its position. *People* v. *Rodgers*, 102 Misc. 437, 170 N.Y. Supp. 86, aff'd 184 App. Div. 461, 171 N.Y. Supp. 451, aff'd 226 N.Y. 671, 123 N.E. 882; *State* v. *Barton*, 5 Wash. 2d 234, 105 P. 2d 63. The trial court's statements

in the *Rodgers'* case were expressly held to be unnecessary to the decision on appeal. Nor was the *Barton* case "factually very close" to petitioner's case (R. 207). In the *Barton* case the record does not show the overwhelming proof of the elements of the offense, as this case does, nor does the *Barton* case show that the question of identity was raised by the testimony of four out of five of the state's own witnesses as well as by the defendant's testimony as to alibi. By their refusal to examine what actually took place and to make a common sense determination thereon, the New Jersey Court has limited collateral estoppel to those relatively rare instances wherein the general verdict, as such, is significant in the second trial—see, for example, *United States* v. *Simon*, 225 F. 2d 260 (3rd Cir.). This protection from continuous litigation is minimal.

The tests applied concerning double jeopardy and the reliance upon the generality of the verdict in relation to the question of collateral estoppel mean that petitioner's conviction was affirmed without ever considering the factual context which gave rise to the indictments or what took place at the first trial. Such abstract rationalizations are arbitrary. Whatever logic there may have been in limiting view on this type of question to a consideration of the common law record, it has been antiquated by the modern practice of keeping transcripts of judicial proceedings.

This Court has twice unanimously rejected the position of the New Jersey Supreme Court that the generality of a verdict in a criminal trial makes it impossible to ascertain the findings it is based upon. *Sealfon* v. *United States*, 332 U.S. 575; *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558. The government may not retry an issue which was decided adversely to it in the first trial. *United States* v. *Sealfon, supra; Harris* v. *State*, 113 Ga. 109, 17

S.E. 2d 573; *People* v. *Grzesczak*, 77 Misc. Rep. 202, 137 N.Y. Supp. 538. In both the *Harris* and the *Grzesczak* cases the defense of alibi was relied upon at the first trial and it was held that the acquittal in that trial precluded the state from trying the defendant for another offense arising out of the same transaction. In addition, the cases of *People* v. *Beltran*, 94 Cal. 2d 197, 210 P. 2d 238 and *State* v. *Dewey*, 206 Ore. 496, 292 P. 2d 799 also recognize the necessity of looking beyond the generality of the verdict to determine its effect.

The case of *United States* v. *De Angelo*, 138 F. 2d 466 (3rd Cir.), decided before this Court's opinion in *Sealfon* v. *United States, supra*, by Judges Jones, Goodrich and McLaughlin, goes further. In that case the defendant had previously been acquitted of the crime of robbery, and the Court of Appeals held that this prior acquittal estopped the government from showing his presence at the scene of the crime in a subsequent prosecution for conspiracy. Therefore it was error to refuse to allow the defendant to prove that participation in the holdup was a disputed issue in the first trial.

**The prohibition against retrying the same fact is the rationalizing principle in other types of double jeopardy cases.**

The relationship between the fundamental policy of the double jeopardy provisions and the prohibition against a second trial on the same fact is demonstrated by other types of cases arising under the constitutional ban. In *Grafton* v. *United States*, 206 U.S. 333, the defendant had been convicted of assassination in the Philippine civil courts after he had been acquitted of killing the same individual in a court-martial proceedings. In that case, Justice Harlan quoted with approval the test employed by the Philippine Supreme Court: "Does the first prosecu-

tion negative the facts charged in the second?" Justice Harlan also relied upon Chitty's statement that "it is sufficient if an acquittal of the one will show that the defendant could not have been guilty of the other". 206 U.S. at 350. The acquittal of Hoag in the first trial because he was not one of the men who robbed Cascio, Capezzuto and Galiardo effectively demonstrates that he was not one of the men who robbed Yager when all four victims were robbed by the same men.

The principle in the *Grafton* case is that there may not be a second trial for a greater offense if there previously has been an acquittal upon an indictment charging a lesser and included offense. This principle is generally recognized. *State* v. *Labato*, 7 N.J. 137, 146, 80 A. 2d 617, 621. For instance, an individual charged and acquitted of the manslaughter of A cannot subsequently be indicted and tried for the murder of A. To do so would be to allow the state to retry the same fact, and a verdict of guilty in the murder trial would be inconsistent with the prior acquittal. There is no difference in principle between this hypothetical and petitioner's case. The only difference is in the method of ascertaining the meaning of the prior acquittal. In view of the present availability of transcripts, this difference is no longer significant.

Nor may the state appeal a finding of fact, absent legal error, for the purpose of obtaining a new trial. *State* v. *Evjue*, 254 Wis. 581, 37 N.W. 2d 50. Wisconsin has a statute allowing an appeal by the State. In the *Evjue* case, the State, without claiming that any legal error was committed in the trial, sought review of the "ultimate determination of acquittal". In denying the right of the state to appeal this determination, the Wisconsin Supreme Court said that to allow such an appeal would be to open the door "to all of the evils sought to be obviated by the con-

stitutional and common law prohibitions against double jeopardy" because "the state could continue its appeals, if successful, until the ultimate decision of the tribunal was satisfactory to it." See also Model Penal Code, Tent. Draft No. 5, p. 48.

Although carried to a greater length, the principle is the same in cases in which the state has obtained a mistrial in the first proceedings. In such cases a second trial is prohibited unless the termination prior to verdict was necessary. The reason for this rule of necessity is the fear that the prosecution, foreseeing defeat at the hands of the first jury, will terminate the trial so that the same issues may be presented to another jury in the future. *State* v. *Locklear*, 16 N.J. 232, 236-37, 242, 108 A. 2d 436, 438, 442. Such a rule is far more drastic than the petitioner's position in this case, where the State has had a decision on the merits of the only issue in either trial.

It may be seen, therefore, that one of the fundamental and basic reasons for the constitutional prohibition of double jeopardy is to prevent relitigation of a factual issue previously decided adversely to the state. This reason extends beyond the confines of the restrictive tests for determining what is the same offense. Actually, the necessity of implementing this policy is increased by the narrow "same offense" tests because of the resultant possibility of increase in the number of trials which can be carved out of one set of operative facts. It is apparent, therefore, that the basic nature of this safeguard is not minimized by the courts' labelling it collateral estoppel in some instances and double jeopardy in others.

Petitioner contends that the State cannot deny him the protection of this basic right by ignoring the obvious finding of the first jury.

The fundamental character of the ban against retrial of the same fact by the state after an adverse decision is highlighted in cases such as petitioner's where there is no new evidence. To allow retrial under such circumstances undermines the cherished rights of the individual and destroys his traditional safeguards against erroneous conviction and governmental arbitrariness.

**E. The second trial, in addition, deprived petitioner of his constitutionally protected right to a speedy trial.**

The State knew from September 20, 1950, the day of the holdup, that Elmer S. Yager had been robbed (R. 156-157). In spite of this knowledge, no indictment was returned for the robbery of Yager until after the acquittal in the trial of May 26, and 27, 1952. Then, after the acquittal, New Jersey surrendered jurisdiction over petitioner by returning him to New York for incarceration (R. 202). It is significant that petitioner was returned to New York for "incarceration" (R. 202) and not to stand trial. He was imprisoned in New York for violation of parole (R. 189) under a 1948 conviction upon his plea of guilty (R. 166). It is, therefore, apparent that this is not a case where he faced possible trial in two jurisdictions.

In May, 1954, New Jersey regained the jurisdiction it had surrendered (R. 161). However, trial for the robbery of Yager did not take place until October 18 and 19, 1954. In the interim of five months between return and trial, petitioner, who was unable to raise bail, was in the Bergen County Jail (R. 189) in spite of the first jury's determination that he did not participate in the holdup. Therefore, as a result of the State's action, the second trial did not take place until 49 months after the robbery and 29 months after the first trial. This State induced delay makes the conviction still more shocking to a sense of justice.

The right to a speedy trial is protected by the United State's Constitution and by the constitution of forty states, including New Jersey. In addition, many states have statutes recognizing this right. Comment, 34 Tex. L. Rev. 1091. It is an essential element of the requirement of a fair trial (*United States* v. *Chase*, 135 F. Supp. 230 (N.D. Ill. E.D.)) and may neither "be frittered away by the laches of public officers" (*Ex Parte Trull*, 133 Kan. 165, 298 P. 775) nor precluded by the State's delay. *United States* v. *Provoo*, 17 F.R.D. 183 (D.C. Md.); *United States* v. *Chase, supra; People* v. *Prosser*, 309 N.Y. 353, 130 N.E. 2d 891.

The delay was prejudicial to the petitioner. In his alibi the petitioner testified that he was at his mother-in-law's home in New York on September 20, 1950 (R. 89, 162). In the interim between the two trials his mother-in-law died (R. 183). Nor can the State, having caused the delay, speculate that the defendant was not damaged because the attorney in the first trial, under the circumstances of that trial, did not call the mother-in-law. Since the only issue in the second trial was the presence of defendant at the robbery, it is apparent that petitioner was deprived of a potentially valuable witness by the State's election.

A speedy trial is essential to a fair trial not only because witnesses die, but also because witnesses forget. Petitioner, who testified as to alibi, testified that his lawyers contacted people who could substantiate his statements and they said it was so long ago that they could not remember (R. 188). It is true that such statements are self-serving, but this is normally true in such cases. The speculative nature of the damages, although it is common sense that such damages are real, is a sound basis for imposing the duty upon the State not to delay the trial purposely. *United States* v. *Provoo*, 17 F.R.D. 183 (D.C. Md.). Nor can the State rely

upon petitioner's incarceration in New York as an excuse for delay. The State had jurisdiction for the first trial, which would have been the ideal time to try the indictment. Having elected to delay, it must take the consequences of that delay. *United States* v. *Provoo, supra; United States* v. *Chase*, 135 F. Supp. 230 (N.D. Ill. E.D.).

## Conclusion

The trial of October 18 and 19, 1954, was based upon the fourth indictment to arise out of one transaction. It was an obvious attempt to avoid the consequences of the first jury's decision that petitioner did not participate in the transaction. This the "prosecution may not do" (*Sealfon* v. *United States*, 332 U.S. 575, 580) because of the "plainest principles of justice" (Justice Heher, dissenting herein, R. 209).

The petitioner, in spite of the first jury's acquittal upon a fact which is conclusive upon all of the indictments including the one herein, was shuttled back and forth between New York and New Jersey at the State's will; he was confined to the Bergen County Jail for five months awaiting this trial; then, he was finally brought to trial over four years after the event and 29 months after his prior acquittal; and, in that belated trial he was convicted upon the testimony of the one man who had identified him in the first trial and who had not been believed at that time. All of this was done by the State without any semblance of justification. Even though the State could offer no justification, these actions were affirmed upon the basis of abstract formulae unrelated to the facts of the transaction or to the facts of the first trial. The State of New Jersey should not be permitted to avoid the constitutional safeguards of the individual by thus closing its eyes to reality.

Petitioner, as a result of this conviction, is being deprived of his liberty without due process of law. Petitioner, therefore, respectfully requests that the Judgment of the Bergen County Court in this case be reversed and that petitioner be released from confinement thereunder.

Respectfully submitted,

ROBERT E. KNOWLTON,
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August 9th, 1957.

## APPENDIX

New Jersey robbery statute in force during 1950.

New Jersey Statutes Annotated 2:166-1
Robbery; penalty

Any person who shall forcibly take from the person of another, money or personal goods and chattels, of any value whatever, by violence or putting him in fear, and his aiders, procurers and abettors, shall be guilty of a high misdemeanor, and punished by a fine not exceeding one thousand dollars, or imprisonment at hard labor not exceeding fifteen years, or both. (L. 1898, c. 235, Sec. 120, p. 827.)

New Jersey Rules of joinder in force during 1952.

Rule 2:4-15 Joinder of Offenses

Two or more offenses may be charged in the same indictment or accusation in a separate count for each offense if the offenses charged, whether high misdemeanors or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(Since September 9, 1953, Revised Rule 3:4-7.)

Rule 2:5-4 Trial of Indictments or Accusations Together.

The court may order two or more indictments or accusations to be tried together if the offenses and the defendants, if there is more than one, could have been joined in a single indictment or accusation. The procedure shall be the same as if the prosecution were under such single indictment or accusation.

(Since September 9, 1953, Revised Rule 3:5-6.)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

**No. 40**

WILLIAM HOAG,

*Petitioner,*

*vs.*

THE STATE OF NEW JERSEY,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of the State of New Jersey**

## BRIEF FOR RESPONDENT


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## TABLE OF CONTENTS


| | PAGE |
|---|---|
| BRIEF FOR RESPONDENT | 1–25 |
| CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED | 1 |
| COUNTER-STATEMENT OF THE QUESTIONS | 3 |
| COUNTER-STATEMENT OF THE CASE | 3 |
| ARGUMENT: | |
| *Point I*—William Hoag was not placed in double jeopardy in violation of constitutional safeguards by his trial and conviction for the armed robbery of Elmer Yager | 7 |
| *Point II*—Defendant Hoag's acquittal of the charge of robbing three alleged victims was not res judicata on the charge of robbing a fourth victim | 10 |
| *Point III*—The first trial of the defendant Hoag was not a conclusive adjudication that he was not present at the robbery, barring a retrial on the doctrine of collateral estoppel | 11 |
| *Point IV*—The re-indictment and retrial of Hoag did not violate fundamental justice under any other principle | 18 |
| *Point V*—Defendant Hoag was not denied the constitutional right to a speedy trial as safeguarded by the Fourteenth Amendment | 20 |
| CONCLUSION | 25 |

## Cases Cited

PAGE

Brock v. State of North Carolina, 344 U. S. 424 (1953) ..... 8fn, 11, 20

Cromwell v. County of Sac, 94 U. S. 351 (1876) .... 12

Dunn v. United States, 284 U. S. 390 (1932) ..... 14

Emich Motors Corp. v. General Motors Corp., 340 U. S. 558 (1951) ..... 14, 15, 16

Hall, In re, 94 N. J. Eq. 108 (Ch., 1922) ..... 17

Palko v. State of Connecticut, 302 U. S. 319 (1937) .... 8fn, 19, 20

Patterson v. State, 50 N. J. L. 421 (E. & A., 1888) .... 22fn

Provoo, Petition of, 17 F. R. D. 183 (D. Md., 1955) ... 22fn

Sawyer, Petition of, 229 F. 2d 805 (7th Cir., 1956), cert. den., 352 U. S. 860 (1956) ..... 23

Sealfon v. United States, 332 U. S. 575 (1948) .... 14, 15, 16

State v. Appice, 23 N. J. Super. 522 (App. Div., 1952), aff'd 13 N. J. 286 (1953), cert. den., 346 U. S. 939 (1954) ..... 22

State v. Chevenceck, 127 N. J. L. 476 (Sup. Ct., 1941) .. 9

State v. Cosgrove, 103 N. J. L. 412 (E. & A., 1927) ... 10

State v. DiGiosia, 3 N. J. 413 (1950) ..... 9

State v. Dilts, 76 N. J. L. 410 (Sup. Ct., 1908) ..... 22fn

State v. Dragone, 99 N. J. L. 144 (E. & A., 1923) .... 17

State v. Greeley, 30 N. J. Super. 180 (Co. Ct., 1954) ... 13

State v. Hoag, 21 N. J. 496 (1956) ..... 8, 23

State v. Labato, 7 N. J. 137 (1951) ..... 9, 16fn

State of Louisiana v. Resweber, 329 U. S. 459 (1947) .. 20

PAGE

State v. Pennsylvania Railroad Co., 9 N. J. 194 (1952) 10

State v. Rosa, 72 N. J. L. 462 (E. & A., 1905) ..... 9

State v. Shoopman, 11 N. J. 333 (1953) .....9, 16fn, 17

State v. Smith, 10 N. J. 84 (1952) ..... 23

United States v. Dotterweich, 320 U. S. 277 (1943) ... 14

United States v. Oppenheimer, 242 U. S. 85 (1916) .. 11

United States v. Rumrich, 180 Fed. 2d 575 (2d Cir., 1950) ..... 21

**United States Constitution Cited**

Fifth Amendment..... 1, 7

Sixth Amendment..... 1

Fourteenth Amendment.....2, 7, 8

**New Jersey Constitution Cited**

1947—Art. I, Par. 10 ..... 2
Par. 11 .....2, 7, 16, 21

**Statutes Cited**

Criminal Code:

Sec. 28, 18 U. S. C. A., Sec. 72..... 14
Sec. 332, 18 U. S. C. A., Sec. 550..... 14

38 Stat. 731, 15 U. S. C. A., Sec. 16..... 15

N.J.S. 2A:160-30 (Uniform Criminal Extradition Act) ..... 5

R.S. 2:166-1 ..... 6

66 (Part 2) McKinney's N. Y. Laws Sec. 851 (Supp. 1957) (Uniform Criminal Extradition Act)..... 5

## Rules Cited

PAGE

R.R. 3:5-2 ..... 2, 16

R.R. 3:5-5 ..... 17

R.R. 3:7-10(g) ..... 24

R.R. 3:11-3 ..... 22, 23

Rule 2:4-15 ..... 2

Rule 2:5-4 ..... 2

## Texts Cited

O'Regan & Schlosser, "New Jersey Criminal Practice" (Rev. Ed.), Sec. 367 ..... 13

Restatement, "Judgments", Sec. 68, scope note at p. 2 12

Scott, "Collateral Estoppel by Judgment", 56 Harv. L. Rev. 1 (1942) ..... 12

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**On Writ of Certiorari to the Supreme Court of the State of New Jersey**

## BRIEF FOR RESPONDENT

### Constitutional Provisions and Statutes Involved

The clauses of the Constitution of the United States cited or relied upon are:

(1) Fifth Amendment which provides:

> "* * * nor shall any person be subject, for the same offense, to be twice put in jeopardy of life and limb; * * *"

(2) Sixth Amendment, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * *"

(3) Fourteenth Amendment, which provides:

> "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The clauses of the Constitution of New Jersey cited or relied upon are:

(1) Art. I, Par. 10 which provides:

> "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; * * *"

(2) Art. I, Par. 11 which provides:

> "No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great."

The New Jersey Supreme Court rule which is involved here, other than Rules 2:4-15 and 2:5-4, which are cited by the Petitioner, is Revised Rule 3:5-2 which provides:

> "A defendant may plead not guilty, guilty, non vult or nolo contendere, excepting, however, that no defendant can plead guilty to murder save as provided by law. The court may refuse to accept a plea of guilty, non vult or nolo contendere, and shall not accept such plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty, the court shall enter a plea of not guilty."

## Counter-Statement of the Questions

1. Whether consistently with due process of law, a state may convict on an indictment for robbery from a fourth person after a general verdict of acquittal on indictments for robbery of three other persons at the same time and place?

2. Whether the issue of non-participation in one of several practically simultaneous offenses is determined by a general verdict of acquittal on another of the offenses after a plea of not guilty, where at the trial the defendant offered evidence only in support of an alibi, but where under the state law the burden remains on the state to prove every element of the crime beyond a reasonable doubt?

3. Whether the law of a state holding a negative answer to question 2 is such a denial of fundamental liberty as to violate the Fourteenth Amendment to the Constitution of the United States?

4. Whether the delay incident to two successive trials for different offenses involving common questions of law and fact, under the particular circumstances, is such a denial of the criminal defendant's right to a speedy trial as to require this Court to reverse a judgment of conviction affirmed by the highest court of a state?

## Counter-Statement of the Case

The Supreme Court of the United States is reviewing upon writ of certiorari the judgment of the Supreme Court of New Jersey, which upon appeal affirmed the conviction of the petitioner William Hoag for the armed robbery of Elmer Yager on September 20, 1950.

Three indictments against William Hoag, John Doe and Robert Roe, charging armed robbery of Patsy Cascio, Louis

Capezzuto and Charles Galiardo were returned by the Bergen County Grand Jury on June 26, 1951 (R. 1-3; 10). Five witnesses appeared before the Bergen County Grand Jury on June 26, 1951, but not including Elmer Yager, according to the Grand Jury minutes which are not of record before this Court. The statement in the dissenting opinion of the New Jersey Supreme Court (R. 211) that Yager was a witness before the Grand Jury on the first presentation is without support in the record and must have been founded upon a misunderstanding at the oral argument.

As summarized in the Statement by petitioner, the alleged armed robbery occurred at Gay's Tavern in Fairview, Bergen County, during the afternoon of September 20, 1950. At the trial of the three indictments on May 26 and 27, 1952, there was unrefuted testimony that three or more robbers (R. 44; 52; 54; 57-58) took property by force from patrons of Gay's Tavern, as well as from the proprietor, Charles Galiardo, known as Gay (R. 19; 20; 44; 45; 53; 54; 58). The witnesses for the State were the three victims, together with Anthony Dottino and Elmer Yager, each of whom testified that property had been taken from him under threat of a gun (R. 44; 58). At the time of the trial, no indictment had been returned charging armed robbery of Anthony Dottino or Elmer Yager.

The Fairview Police took written statements from Cascio, Capezzuto, Galiardo and Yager on the day of the armed robbery at Gay's Tavern (R. 156; 157). A composite description of one of the robbers, which appeared in the police blotter entry, conformed approximately to William Hoag's description: "6 foot 2 inch in height, about 150 to 170 pounds, between the ages of 25 and 30, wore brown pants and sport jacket, open collared shirt, carried a small white revolver and wore glasses." (R. 154). Galiardo and Dottino both identified a photograph of Hoag as one of the armed robbers within the next few days (R. 33; 40; 45;

143). Several weeks later Yager similarly identified a photograph of Hoag from among several photographs shown to him at Gay's Tavern (R. 117). Galiardo, Dottino and two other men not identified in the record were taken in July, 1951 to Police Headquarters at Center Street, New York City (R. 195-198). Galiardo and Dottino made statements identifying a photograph of Hoag (R. 196; 197). These two, with Cascio and Capezutto, failed late in 1951, after Hoag's arrest in New York (R. 180), to pick him from a line up of suspects (R. 93-94). On or about December 10, 1951, Yager went with another county detective to New York City and positively identified Hoag out of a line up (R. 93; 117; 161; 169).

A requisition of the Governor of New Jersey, dated December 18, 1951, demanded the extradition of William Hoag from the State of New York to the State of New Jersey for the trial of the three indictments. The fugitive waived extradition proceedings (R. 109), pursuant to the Uniform Criminal Extradition Act (N.J.S. 2A:160-30; 66 (Part 2) McKinney's N. Y. Laws Sec. 851 (Supp. 1957)).

Despite the identifications of Hoag's photograph by Galiardo and Dottino, only Yager testified that Hoag was one of the participants in the holdup at the trial of the Capezzuto, Cascio and Galiardo indictments. Galiardo testified: "This Mr. Hoag looks like the man that was in my place." (R. 22). Dottino acknowledged that he had signed a paper identifying Hoag as one of those involved in the robbery but testified at the trial: "It looks like the man but I'm not positive." (R. 45). Yager confirmed his previous specific identification (R. 58). The two alleged victims, other than Galiardo, both testified that they were unable to identify anyone in the court room as one of those involved in the armed robbery (R. 53; 55). The defendant, without supporting witnesses, testified to an alibi that he had stayed "all day long" or most of the day on September

20, 1950 at the home of his mother-in-law in New York City (R. 90).

The victims named in the indictments testified to the elements of robbery under the New Jersey statute (former R.S. 2:166-1). The addendum to the Statement in Lieu of Record, which is referred to in the dissenting opinion below (R. 210), stipulated no "dispute" of the fact of the robbery or that Cascio, Capezzuto and Galiardo were victims. The stipulation was not binding except as to the circumstances evident in the full record: that no evidence rebutting the State's case on the elements of robbery had been offered, that the defendant relied on an alibi and that the single contested issue at the trial was the identification of William Hoag as a participant.

After the verdict of acquittal on the Cascio, Capezzuto and Galiardo indictments (R. 5-6), William Hoag again waived extradition and was returned to New York State on May 28, 1952, for imprisonment for parole violation (R. 189). A complaint charging Hoag with armed robbery of Elmer Yager at Gay's Tavern on September 20, 1950 was brought before the Bergen County Grand Jury two months after the judgment of not guilty on the first three indictments. The Grand Jury returned a fourth indictment against him on July 17, 1952. His subsequent return to New Jersey on May 11, 1954 from a New York penal institution (R. 161; 189) was pursuant to an extradition warrant of the Governor of New York.

Elmer Yager was the State's single witness, except on rebuttal, at the second trial of William Hoag on October 18, 1954, in the Bergen County Court. Yager made the same positive identification (R. 113; 118). On cross examination when pressed as to how he could be sure of the defendant's identity, the witness used this graphic language: "Anybody would have a gun stuck into them, they would sure remember the fellow's face, directly in front." (R. 134).

The defense called Galiardo, Dottino, Capezzuto and Cascio as witnesses. All four repeated their testimony at the first trial that they were unable to make a positive identification (R. 143) or that Hoag was not one of the participants in the armed robbery (R. 137; 149; 151). Hoag reiterated his alibi defense (R. 162). The State produced Detective DeMarco of the Bergen County Prosecutor's Office as a rebuttal witness. Statements by Galiardo and Dottino identifying Hoag's photograph were marked in evidence for the purpose of attacking their credibility (R. 196-198).

The trial of William Hoag for armed robbery of Elmer Yager resulted in a verdict of guilty. The judgment of conviction was sustained on appeal in the highest court of New Jersey and is now before this Court because of the asserted deprivation of due process of law by the State courts in violation of the Fourteenth Amendment to the Constitution of the United States.

## *ARGUMENT*

## POINT I

### William Hoag was not placed in double jeopardy in violation of constitutional safeguards by his trial and conviction for the armed robbery of Elmer Yager.

The protection after acquittal against trial for the same offense is a safeguard in the Constitution of New Jersey (Art. I, par. 11). By the Fifth Amendment, the Government of the United States is barred from subjecting any person to being put twice in jeopardy of life and limb for the same offense. Although not developed as such, the petitioner's argument here presumably is that the right against double jeopardy is a fundamental liberty safeguarded by the Fourteenth Amendment against denial by the States.

The scope of the Fourteenth Amendment in double jeopardy cases is not germane in the proceeding before this Court on a writ of certiorari.* This is not a double jeopardy case. Under established rules of New Jersey, as well as in other common law jurisdictions, the petitioner Hoag was not retried for the same offense after acquittal. He was acquitted of the crimes of armed robbery of Patsy Cascio, Louis Capezzuto and Charles Galiardo. The conviction now under review is for the crime of armed robbery of Elmer Yager, a separate offense although occurring at the same place and at approximately the same time as the robberies of the other three victims. The Supreme Court of New Jersey in *State* v. *Hoag*, 21 N. J. 496 (1956) (R. 200) applied the law of the state in determining that the defendant Hoag was not tried twice for the same offense. This determination is valid in accordance with general law as well as New Jersey law, under the recognized tests of double jeopardy.

The same evidence that was necessary to sustain the fourth indictment would not have been sufficient to secure a conviction on the first three indictments. The crime of armed robbery requires proof of putting the victim in fear and taking property forcibly from his person. Such evidence in support of the indictment for armed robbery of

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* See *Palko* v. *State of Connecticut*, 302 U. S. 319 (1937) and *Brock* v. *State of North Carolina*, 344 U. S. 424 (1953) which recognize that a retrial of a criminal defendant by any state may constitute a denial of the fundamental essentials of due process of law in violation of the Fourteenth Amendment. The *Palko* case reviewed a state court judgment of conviction upon a retrial after a previous state court judgment had been reversed for legal error, upon an appeal by the state pursuant to statute. The *Brock* case brought before this Court the issue of the validity of a state court conviction, after a previous mistrial upon the motion of the state because two state's witnesses refused to testify on the grounds of the privilege of self-incrimination. This Court sustained the judgments of conviction in both cases.

Yager would have been without bearing on the separate charges for armed robbery of Cascio, Capezzuto and Galiardo. In addition to *State* v. *DiGiosia*, 3 N. J. 413 (1950); *State* v. *Labato*, 7 N. J. 137 (1951) and *State* v. *Shoopman*, 11 N. J. 333 (1953), which are cit[illegible] in the majority opinion (R. 204); *State* v. *Rosa*, 72 N. J. L. 462 (E. & A. 1905) and *State* v. *Chevencek*, 127 N. J. L. 476 (Sup. Ct. 1941) are in accord that the plea of *autrefois acquit* is available only where there is identity of the offenses charged in the first trial, resulting in acquittal, and in the subsequent prosecution. As Chief Justice BROGAN stated in *State* v. *Chevencek*, at 127 N. J. L. 479: "'If the offenses be distinct at law it is immaterial that they may be close in point of time.''

The Supreme Court of New Jersey in *State* v. *DiGiosia* summarized the New Jersey and common law at 3 N. J. 418:

> "It is an ancient principle of the common law that one may not be twice put in jeopardy for the same offense. The pleas of *autrefois acquit* and *autrefois convict* are grounded on the maxim that 'a man shall * * * not be brought into danger of his life for one and the same offense more than once.' *Hawkins' Pleas of the Crown*, pp. 515, 526. Blackstone stated the doctrine to be that 'when a man is once fairly found not guilty upon an indictment, or other prosecution, before any court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime;' it protects against a second prosecution 'for the same identical act and crime.' 4 *Blackstone's Comm.* 335, 336. Chitty said that both these pleas depend on the principle that 'no man shall be placed in peril of legal penalties more than once upon the same accusation.' 1 *Chitty Cr. L.* 452, 462.''

The "single act" test of double jeopardy is as plainly inapplicable. Even if it is assumed without proof that the defendant or his fellow participants in the armed robbery brandished a gun once only, each victim was individually put in fear and robbed of property of value. The forcible takings occurred necessarily at divergent times. New Jersey cases, such as in *State* v. *Cosgrove*, 103 N. J. L. 412 (E. & A. 1927) (manslaughter of one victim and atrocious assault and battery upon another victim because of knocking both down at once by automobile) and *State* v. *Pennsylvania Railroad Co.*, 9 N. J. 194 (1952) (manslaughter of 84 persons in a train wreck) have held that a single act resulting in multiple criminal offenses against several persons could not be retried after acquittal on an indictment upon complaint of one of the victims.

These decisions are inapplicable because separate acts were involved in the robberies of Cascio, Capezzuto, Galiardo and Yager, separate intimidations and separate takings by force. In the language of the Superior Court, Appellate Division, the robbing of Yager "was not an essential ingredient or legally integral part of the alleged offenses of robbing the other three" (R. 17).

## POINT II

**Defendant Hoag's acquittal on the charge of robbing three alleged victims was not res judicata on the charge of robbing a fourth victim.**

Whether the defense of res judicata must be accorded weight by the states in criminal proceedings as a matter of fundamental due process of law need not be decided here. Under established rules in New Jersey and elsewhere, res juricata bars a retrial of the same cause of action between the same parties. After a judgment of acquittal in a criminal case, res judicata merges with double jeopardy as a defense against a subsequent prosecution for the same

offense. Res judicata alone protects where there is a final judgment for defendant before jeopardy has attached. *United States* v. *Oppenheimer*, 242 U. S. 85 (1916). Double jeopardy is available in instances where the first proceeding failed to result in a judgment on the merits but jeopardy did attach. Cf. *Brock* v. *State of North Carolina, supra.*

The criminal liability of William Hoag for the robbery of Elmer Yager was not adjudicated in the trial of the three indictments on May 26 and 27, 1952. The issues at that trial were whether the defendant Hoag had committed armed robbery or aided and abetted in an armed robbery of Cascio, Capezzuto and Galiardo. The parties remained the same in the second trial but the subject matter, the robbery of a fourth victim, was different. The acquittal of May 27, 1952 was not a judgment of not guilty of the crime of armed robbery of Elmer Yager.

The Supreme Court of New Jersey held here that robbery of several persons where property is removed from each person involves a separate criminal act. That determination accords with established basic principles excluding double jeopardy and res judicata on a retrial after acquittal of the crime of robbery of another alleged victim.

## POINT III

**The first trial of the defendant Hoag was not a conclusive adjudication that he was not present at the robbery, barring a retrial on the doctrine of collateral estoppel.**

William Hoag invokes the doctrine of collateral estoppel as within the protection of the Fourteenth Amendment. According to the argument here, as well as before the Supreme Court of New Jersey, the acquittal in the first trial necessarily determined the issue of identity in the criminal defendant's favor and that issue, once having been adjudi-

cated between the same parties, cannot be resubmitted to a jury at a second trial.

Petitioner cites no cases holding that collateral estoppel must be applied by the states in criminal cases as part of fundamental due process of law. There is indecisive authority on the shield of the Fourteenth Amendment in double jeopardy and res judicata cases. A determination by this Court that the Supreme Court of New Jersey erred in holding collateral estoppel unavailable would vest this defense, which appears more remote from fundamental liberty, with a sanctity not specifically accorded in any prior case to double jeopardy and res judicata.

To rule thus the Court must hold (1) that the issue of identity was determined in the first trial of William Hoag, contrary to New Jersey law, and (2) that the failure to lend decisive effect to collateral estoppel was a denial of the fundamental essentials of a fair trial under due process of law.

The doctrine of collateral estoppel emerged in civil cases. See *Cromwell* v. *County of Sac*, 94 U. S. 351 (1876); *Restatement, Judgments*, Sec. 68, scope note at p. 2; Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1 (1942). As expressed in the *Restatement, Judgments*, Sec. 68:

> "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action * * *."

The issue of identity was not finally determined in the trial of William Hoag for the armed robbery of Cascio, Capezzuto and Galiardo. The jury rendered a final verdict of not guilty. The prosecution had therefore failed in its

burden of establishing the guilt of the defendant of the crime of armed robbery beyond a reasonable doubt, to the satisfaction of the jury. In New Jersey, as well as in other common law jurisdictions, the burden of proof is upon the State and that burden never shifts. The State cannot be granted a directed verdict in criminal cases. Despite the unrefuted testimony and evidence that each alleged victim, Cascio, Capezzuto and Galiardo, was put in fear and had property forcibly taken from him, the defendant had an unchallengeable right to a jury determination of the facts of putting in fear, forcible taking of property and of criminal intent. O'Regan & Schlosser, *New Jersey Criminal Practice* (Rev. Ed.), Sec. 367.

In *State* v. *Greeley*, 30 N. J. Super. 180, 186 (Co. Ct. 1954) it was stated: "* * * [T]he court has no power to direct the jury to convict. While it is within the court's right, in a case where evidence of guilt is virtually uncontroverted, to indicate to the jury its corresponding duty in the circumstances, the fact is that any precept thus imparted is reversible error when it is such as fails to leave the jury entirely free to reject it."

According to the dissenting opinion of the Supreme Court of New Jersey, the county prosecutor was unable in oral argument to suggest an alternative hypothesis for the first acquittal other than the jury's finding that Hoag did not participate in the robbery at Gay's Tavern (R. 211). The alternative hypotheses are that the jury did not believe that Cascio, Capezzuto or Galiardo were put in fear or that property was forcibly taken from them.

The jury realized that all three were called as State's witesses and may have concluded that their testimony was not to be trusted because of apparent retraction of previous identifications. The jury may have believed erroneously that, if the victim of a crime does not identify the

criminal, the state is without power to prosecute. The prosecution may have been viewed by the jury as within the control of the victims of the crime; upon an indication that the prosecution was against the wishes of the alleged victims, the jury may have decided that an acquittal was a just disposition. Errors of law by a jury are not appealable in New Jersey. This Court has sustained inconsistent verdicts of conviction in *Dunn* v. *United States*, 284 U. S. 390 (1932) and *United States* v. *Dotterweich*, 320 U. S. 277 (1943).

There can be no certainty that the jury in the first trial of Hoag determined that Hoag's alibi was valid or that he was not one of the armed robbers or participants in the armed robbery at Gay's Tavern. A general verdict cannot be probed under these circumstances. *Sealfon* v. *United States*, 332 U. S. 575 (1948) and *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951), both arising on appeal from the lower Federal courts and not authorities on the availability of the Fourteenth Amendment in collateral estoppel cases, are relied upon by petitioner but are plainly distinguishable.

Under the facts in the *Sealfon* case, a criminal defendant sought a reversal of a conviction for uttering false invoices in violation of Sec. 332, Criminal Code, 18 U. S. C. A. Sec. 550, because of a prior acquittal on a complaint for conspiracy to defraud the United States by presenting false invoices in violation of Sec. 28, Criminal Code, 18 U. S. C. A. Sec. 72. The second prosecution was for the substantive offense and was considered upon overwhelming authority as a separate and distinct offense from the conspiracy to commit it. The appellate issue therefore was the collateral estoppel effect of the determination in the first trial that the defendant had not conspired with one Greenberg to defraud the government by presenting false invoices and making false representations that sales of

syrup had been made to the Brooklyn Navy Yard. The only evidence in the first trial linking Sealfon with the conspiracy was a letter written by him to Greenberg stating that "Some of our syrups are being sold to the Brooklyn Navy Yard." At the second trial the same letter was introduced as the only evidence that Sealfon had aided and abetted Greenberg in the commission of the crime of uttering false invoices. The Court in an opinion by Justice DOUGLAS concluded: "It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent." The holding of *Sealfon v. United States* authorizes an inquiry into a verdict of acquittal only to determine the extent it adjudicated the guilt or innocence of a substantive offense, there writing a letter pursuant to an agreement to defraud. The acquittal at the conclusion of the first trial of William Hoag was not an adjudication that the defendant had not committed the criminal offense charged at the second trial or, because of the general verdict, that he was not present or a participant in the Gay's Tavern holdup.

Likewise in the *Emich Motors Corp.* case, the collateral estoppel effect of a criminal conviction in a subsequent civil proceeding was extended only to the issues necessarily determined. By statute, 38 Stat. 731, 15 U. S. C. A. Sec. 16, final judgments in criminal prosecutions under the anti-trust laws are established as prima facie evidence in civil proceedings brought by any victim for redress for the anti-trust law violation. The Court in an opinion by Justice CLARK held that the criminal judgment was prima facie evidence of the general conspiracy and that to establish a prima facie case the petitioners needed only to produce evidence of the impact of the conspiracy on them, such as the cancellation of their franchises and the purpose of General Motors in cancelling them, as well as evidence of any resulting damages.

The circumstances of the *Emich Motors* case, as well as of the *Sealfon* case, do not support the petitioner Hoag's position that a scrutiny may be made into a general verdict of acquittal, leading to the speculative conclusion that it determined one of several issues in favor of the criminal defendant. Neither legal theory nor fundamental justice supports that position.

The burden is on the defendant Hoag claiming a collateral estoppel to establish the final determination of the issue of identity at his first trial. That burden has not been met and cannot be met because of the general verdict determining that he was not guilty of three offenses other than the offense here charged.

New Jersey procedure fails to provide any plea of collateral estoppel in criminal cases. The unavailability of any form of procedural relief is a decisive indication of a lack of substantive right to urge collateral estoppel as to one of several issues encompassed by a general verdict of acquittal.

R.R. 3:5-2 sets forth the pleas in criminal cases: guilty, not guilty, non vult and nolo contendere. The additional common law defenses of autrefois acquit and autrefois convict are still recognized because of the constitutional safegu d against double jeopardy in Art. I, Par. 11 of the State Constitution of 1947.*

The plea of autrefois acquit was not raised by the defendant Hoag despite his assertion of double jeopardy (R. 159). Because he was not tried for the armed robbery of Elmer Yager, his acquittal at the first trial was no support to the defense of autrefois acquit under established and New Jersey common law principles. He was not retried for the same offense. (See Points I and II, *supra.*)

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* *State* v. *Labato*, 7 N. J. 137, 143 (1951); *State* v. *Shoopman*, 11 N. J. 333, 336 (1953).

The highest court of New Jersey held in *State* v. *Dragone*, 99 N. J. L. 144 (E. & A. 1923) that evidence of a prior acquittal was not admissible as a defense under the general issue raised by a plea of not guilty. Double jeopardy as a defense is waived unless specifically pleaded by autrefois acquit or autrefois convict or by a motion for dismissal under the rules of the New Jersey Supreme Court (R.R. 3:5-5). *In re Hall*, 94 N. J. Eq. 108 (Ch. 1922), a habeas corpus proceeding, is in accord with *State* v. *Dragone* that a waiver of the issue of double jeopardy is conclusive upon a criminal defendant. The procedural law is a confirmation that criminal defendants may not resort to collateral estoppel in asserting conclusiveness to a general verdict upon less than all issues.

One of the decisions of the new Supreme Court, *State* v. *Shoopman*, 11 N. J. 333 (1953) illustrates the limitations on collateral estoppel under New Jersey law. A defendant, charged with the criminal offense of causing death by driving an automobile recklessly, pleaded autrefois acquit based upon his acquittal of the motor vehicle offense of reckless driving. The Supreme Court held that the adjudication that the defendant was not guilty on the reckless driving charge was not decisive in the criminal prosecution. Justice WACHENFELD in a majority opinion wrote at 11 N. J. 336:

> "Article I, paragraph 11, of the Constitution of 1947, which substantially follows the Fifth Amendment of the United States Constitution, reads: 'No person shall, after acquittal, be tried for the same offense.'
>
> "Keeping in mind the constitutional provision set out, does the judgment of the court below contravene either the spirit or the language of the mandate or trespass upon fundamental justice? We think not, because 'reckless driving' and 'death by reckless driving' are not 'the same offense.' One is a crime; the other is not. Each is specifically and separately de-

fined and the one has an element foreign to and not required in the other.

"The two offenses are not identical and the evidence required to convict on the reckless driving charge, while admissible and relevant in proving the more serious offense, is not by itself sufficient to sustain the charge laid in the indictment."

Petitioner Hoag is not denying guilt before this Court, although his plea was not guilty. He is attacking instead the adjudication of the New Jersey courts that the general verdict of acquittal at his first trial did not finally determine that he was not a participant in the armed robbery at Gay's Tavern. Hoag cannot with certainty establish that the first acquittal was in his favor on the issue of identity. Within the province of New Jersey law, the State Supreme Court has determined that double jeopardy, res judicata and collateral estoppel all are inapplicable. That determination is not at war with fundamental due process of law.

## POINT IV

### The re-indictment and retrial of Hoag did not violate fundamental justice under any other principle.

Petitioner Hoag colors his brief here with references to the requirement of proof beyond a reasonable doubt, the right to counsel and other safeguards of liberty enshrined in Anglo-American society (Pet. Br. 16-17). Those references are irrelevant to the review of the New Jersey Supreme Court judgment. Hoag is not arguing and on the record cannot argue lack of proof beyond reasonable doubt, partiality of the judge, denial of the right to counsel, the use of perjured testimony, or the knowing withholding of relevant evidence.

The State failed to indict Hoag for the armed robbery of Elmer Yager until after the first trial. The New Jersey

Supreme Court rules on joinder of offenses in criminal cases then in force did not make mandatory the joinder within one indictment of offenses based on the same criminal transaction or involving common questions of law and fact, or the joinder for trial of two or more indictments which could have been joined in a single indictment. The rules of joinder are discretionary. The record fails to disclose why no indictment charging armed robbery of Elmer Yager was returned in July, 1951 at the time of the Cascio, Capezzuto and Galiardo indictments. The State's prospects for a conviction would presumably have been enhanced by the joinder of an indictment for armed robbery of Yager, because of his positive identification of Hoag by photograph and in the police line up.

Joinder is, in fact, impossible in many cases. The complaining witnesses in one transaction involving multiple criminal offenses may not be available within the State. A holding by this Court in favor of the petitioner Hoag would require the State either to withhold prosecution for one of multiple crimes arising out of a criminal transaction until all victims were on hand as witnesses, or, in the alternative, to go to trial in the absence of one or more complaining witnesses who may have detailed and accurate testimony, without any further power to prosecute for the separate offenses not there tried. The clearer recollection and more detailed account by Elmer Yager as a witness is impressive in a reading of the transcripts of the two trials of William Hoag.

By arguing that the retrial prejudiced his right to a fair trial, the petitioner Hoag is apparently of the view that he has only a 50-50 or equal prospect of a just verdict.

Several United States Supreme Court cases have pointed to the factors of malice or deliberate harassment as significant in cases involving retrials on the issue of double jeopardy. Justice Cardozo in *Palko* v. *State of Connecti-*

*cut, supra,* noted that the State was "not attempting to wear the accused out by a multitude of cases with accumulated trials." The lack of malice in the electric chair failure in *State of Louisiana* v. *Resweber*, 329 U. S. 459 (1947) was decisive. In the concurring opinion in *Brock* v. *State of North Carolina, supra,* Justice FRANKFURTER commented:

> "A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."

Justice FRANKFURTER's language is not in point here because defendant Hoag was not retried for a charge upon which he had been earlier acquitted. The record before this Court lacks any indication of callousness, malice, deliberate harassment or prejudice resulting from a retrial *per se*. The trial of the defendant William Hoag which resulted in the judgment of conviction now under review accorded with fundamental fair play by all tests.

## POINT V

**Defendant Hoag was not denied the constitutional right to a speedy trial as safeguarded by the Fourteenth Amendment.**

The defendant William Hoag asserts a denial of his constitutional right to a speedy trial because the trial on the charge of armed robbery of Elmer Yager did not take place until forty-nine months after the robbery and twenty-nine months after the trial of the Cascio, Capezzuto and Gallardo indictments. This interval is attacked as a "state induced delay" (Pet. Br. 29).

The delay resulted in large part from Hoag's complications with the criminal law of two states, New Jersey and New York. He was not arrested until more than one year after the robbery at Gay's Tavern. He waived extradition and was brought to New Jersey for trial of the first three indictments in January, 1952 (R. 109). He was returned to New York for imprisonment for violation of parole the day after his acquittal on the Cascio, Capezzuto and Galiardo indictments (R. 189) again without extradition. At the time of the fourth indictment on July 17, 1952, Hoag was in a New York penal institution. The State of New Jersey reacquired Hoag upon the extradition warrant of the Governor of New York for the trial of the Yager indictment, on May 11, 1954. The second trial, resulting in conviction, was held on October 18, 1954 at the next term of the Bergen County Court, Law Division, Criminal, which was not in session for criminal trials during the summer months.

The extended periods during which (1) Hoag was a fugitive from justice (R. 163; 180; 191; 192) and (2) he was imprisoned in another state should not be computed in any total time period amounting to an alleged delay of the right to a speedy trial, in violation of the constitutional guarantees.

The failure to try Hoag from May to October, 1954, was likewise not a deprivation of due process of law. Hoag was imprisoned awaiting trial during this interval because of his inability to post bond. The New Jersey Constitution in Art. I, par. 11 guarantees the right of bail except in capital cases. But there is no constitutional right to be free without bail. As stated in *United States* v. *Rumrich*, 180 Fed. 2d 575, 576 (2d Cir. 1950):

> "A person arrested upon a criminal charge who cannot give bail, has no recourse but to move for trial.

> If upon the return of such a motion the court should deny him the speedy trial to which the constitution entitles him, it may be that he should be released on habeas corpus * * * ".

New Jersey formerly had the two-term rule to insure speedy trials. A criminal defendant indicted in one term of court was entitled to trial before the conclusion of the next term of court.* That rule was supplanted by Supreme Court Revised Rule 3:11-3, equally protecting the criminal defendant, which provides that, at any time after six months following the return of an indictment, the assignment judge may direct that the trial of the indictment be moved upon a day specified. The court may thereafter order the dismissal of the indictment upon failure of the prosecuting attorney to comply with the assignment judge's order.

The total time during which the defendant Hoag awaited trial, other than his period of approximately two years in prison in New York State, was less than six months after the return of the indictment for armed robbery of Elmer Yager. The dismissal of his indictment because of a delay attributable to his imprisonment in another state would have been an abuse of the assignment judge's discretion contrary to all practice. Whatever the outcome if he had moved for the fixing of a trial day, the defendant Hoag never so moved and must be deemed under New Jersey authority to have waived his rights to a speedy trial.

*State* v. *Appice*, 23 N. J. Super. 522 (App. Div. 1952), aff'd. 13 N. J. 286 (1953), cert. denied 346 U. S. 939 (1954) is decisive of the New Jersey law. In *State* v. *Appice*, a

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* *State* v. *Bilts*, 76 N. J. L. 410 (Sup. Ct. 1908); *Patterson* v. *State*, 50 N. J. L. 421 (E. & A. 1888). See *Petition of Provoo*, 17 F.R.D. 183, 196 (D. Md. 1955).

prisoner serving a sentence for another crime moved to dismiss indictments for attempted robbery and assault with intent to kill, which had been returned against him four and a half years earlier. The New Jersey Supreme Court affirmed the denial of the defendant's motion on the opinion of the Superior Court, Appellate Division. The prisoner had never applied to the assignment judge or any other judge to fix a specific date for trial pursuant to the predecessor rule to R.R. 3:11-3. The Appellate Division characterized the right to a speedy trial as a personal right subject to waiver, and noted further the lack of proof of prejudice against the defendant. In the *Hoag* case now under review before this Court there is a similar total failure to show any prejudice as a result of the alleged delay in the trial of the Yager indictment. Justice OLIPHANT of the New Jersey Supreme Court ruled decisively in *State* v. *Smith*, 10 N. J. 84, 93 (1952):

> "Defendants never had under the constitutional guaranty of a speedy trial the right to have an indictment dismissed; they merely could apply to the court to fix a day certain and on the failure of the State to proceed they could be discharged on their own recognizance or a judgment of acquittal entered."

Hoag claims prejudice in the intervening death of his mother-in-law (Pet. Br. 30), but he failed to produce her as a witness in support of his alibi at the first trial, although she was then alive (R. 183).

The Court of Appeals for the Seventh Circuit reviewed the applicability of the constitutional guarantee of a speedy trial to state court proceedings, under the Fourteenth Amendment in *Petition of Sawyer*, 229 F. 2d 805 (7th Cir. 1956), cert. denied 352 U. S. 860 (1956). The Court stated at p. 811:

> "* * * It is clear that the Federal Constitution does not give an absolute right to a 'speedy trial' as such to persons tried in state courts. The constitutional right to a 'speedy trial' is contained in the Sixth Amendment. It is common knowledge that the first ten amendments do not apply to state tribunals and that the Fourteenth Amendment, which does apply to the states, does not necessarily include all of the first ten. * * * Before we can order the release of a state prisoner for failure to obtain a 'speedy trial', we must be convinced that the failure resulted in the taking of the prisoner's liberty or property without due process of law."

The defendant Hoag was not deprived of due process of law in the failure to bring him to trial on the indictment for armed robbery of Elmer Yager between July 17, 1952 and October 18, 1954. He was imprisoned in New York most of this period and in Bergen County Jail awaiting trial for an additional period of five months because of his failure to post bail. The County Court was not open for criminal trials during the months of July and August, 1954. The delays were not prejudicial. Credit against his sentence for the time of imprisonment awaiting trial is guaranteed by the New Jersey Supreme Court Rules (R.R. 3:7-10(g)). Specific relief was available under the New Jersey Rules and cases by an application for the fixing of a date for trial. The defendant Hoag did not seek this relief or any relief to cut short his time awaiting trial. His assertion of a denial of his constitutional right to a speedy trial is without warrant in the facts, as well as procedurally barred.

## CONCLUSION

The courts of New Jersey have determined that the trial of William Hoag for the armed robbery of Elmer Yager did not offend the constitutional guarantees of fundamental fair play and against double jeopardy. The State of New Jersey respectfully urges that the judgment of conviction was in accordance with due process of law and should be affirmed.

Respectfully submitted,

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